

C A S E S
DETERMINED
AT NISI PRIUS,
IN THE
COURT OF KING's BENCH, &c.

C A S E S :

DETERMINED AT

Risi Prius,

IN THE

Court of King's Bench;

From the Sittings after EASTER Term 30 GEORGE III.

To the Sittings after MICHAELMAS Term 35 GEORGE III.

BOTH INCLUSIVE.

BY THOMAS PEAKE,

OF LINCOLN'S INN.

THE SECOND EDITION CORRECTED, WITH SOME ADDITIONAL
CASES, AND REFERENCES TO SUBSEQUENT DECISIONS.

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FOR

W. REED, LAW BOOKSELLER, BELL YARD, TEMPLE BAR;
AND
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1813.

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HILARY TERM, 49 GEORGE III.

no evidence of any term being fixed upon during which he was to continue in the defendant's service; and he was to be paid weekly wages from the moment of his being set to work at the business. The defendant therefore is liable to a penalty, whatever may be the policy of the statute by which it is imposed.

1809.

BEALE
v.
GEALE.

Verdict for the plaintiff.

Garrow and *Espinasse* for the plaintiff,

Marryat for the defendant.

[Attorneys, *Brown* and *Empson*.]

Vide Coward v. Maberley, post.

JEFFERIES v. DUNCOMBE.

Tuesday,
Feb. 14.

THIS was an action on the case for suspending a lamp before plaintiff's house in the day-time, to denote that he kept a brothel.

In an action for suspending a lamp before plaintiff's house, to denote that he kept a brothel, the parish in which the declaration states the house to have stood and the tort to have been committed, is to be considered as venue merely, not as local.

The declaration stated, that at the time of the grievance complained of, the plaintiff was occupier of a certain dwelling-house with the appurtenances, situate, lying, and being in a certain public street called Artillery Street, to wit, in the parish of the Old

description; and it is immaterial whether there be any such parish in existence.

1809: *Artillery Ground in the county of Middlesex,* in which he carried on the business of a carpenter, and a great part of which he let out to lodgers; yet that the defendant, intending to cause it to be believed that he kept a disorderly house, and to subject him to the punishment provided for that offence, unlawfully, wantonly, and maliciously, without any reasonable or probable cause, to wit, on the 25th day of August, 1808, *in the parish aforesaid in the county aforesaid,* put up, raised, and erected in the said public street called Artillery Street, *to wit, in the parish aforesaid in the county aforesaid,* a certain lamp in the front of and near adjoining to the said dwelling-house of plaintiff, and caused the same to be lighted and kept lighted and burning during the day-time for a long space of time, &c. thereby designating the said dwelling-house of plaintiff as a bawdy house, &c. by means whereof his lodgers left him, and he was injured in his business.

Garrow for the defendant insisted, that the plaintiff must be nonsuited, as there was no such parish as "*the parish of the Old Artillery Ground.*"

Park, contra, maintained, that wherever the parish was mentioned, it was by way of venue, not of local description, and that it was the same as if it had been laid in the parish of St. Mary le Bow in the ward of Cheap.

Lord ELLENBOROUGH was of the latter opinion, but saved the point; and the plaintiff had a verdict with 1*s.* damages.

Next

Next term a rule nisi was granted to set aside the verdict: but cause being shewn, the Court unanimously held, that the parish mentioned in the declaration must be referred to *venue* in the same manner as if this had been an action for a libel; and GROSE, J. said, it might be considered an action for libelling the plaintiff by means of suspending a lamp before his door.—*Rule discharged.*

1809.
JEFFERIES
v.
DUNCOMBE.

Park and Espinasse for the plaintiff.

Garrow and Bolland for the defendant.

[Attorneys, Isaacs and Parnell.]

In trespass *quare clausum frēgit*, where the locus in quo is stated to be in the parish of *A*. it is enough if *A*. has a church and overseers of its own, and is reputed a parish, although perhaps strictly speaking it may be only a hamlet. In such an

action the Court will not try a question of *parochiality*. Per Lord ELLENBOROUGH, C. J. *Anon. Hertford Sum. Ass.* 1809.

Vide Mersey and Irwell Navigation Co. v Douglas, 2 East, 437.

KING, Esq. v. MILSOM.

Wednesday,
Feb 15.

TROVER for a 50*l.* Bank of England note.

The plaintiff's case was, that he had lost the note from his pocket in the streets; and that the

for a bank note, it is not a *prima facie* case for the plaintiff, to prove, that the note belonged to him, and that the defendant afterwards converted it: and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it *malā fide* or *without consideration*.

Possession is *prima facie* evidence of property in negotiable instruments. Therefore, in trover

1809.

KING

v.

MILSOM.

defendant, into whose possession it soon after came, was not the *bond fide* holder of it for a valuable consideration.

The facts proved were, that on the 18th of July 1808, the note was in the possession of the plaintiff as his property ; that on the 21st of the same month payment of it was stopped at the Bank of England by his orders ; that the following day an advertisement was inserted in a newspaper taken in by the defendant, stating the loss of the note, and mentioning where it should be carried by the finder ; that it was brought into the Bank on the 29th of August, and immediately traced to the defendant, who keeps a public-house ; that he at first said he did not recollect how he came by it, and afterwards affirmed he had given change for it about a month ago to a stranger, in payment of a glass of brandy and water ; but that he can neither write nor read, and that he was accustomed to receive notes of equal amount in the course of his business.

Garrett for the plaintiff insisted, that this evidence rendered it incumbent upon the defendant to shew his title to the note. To support an action of trover, it was *prima facie* enough to prove that the article in question had been the property of the plaintiff, and had been converted by the defendant. To be sure, the defendant might still shew that he had received it as a present from the plaintiff, that he had bought it in market overt from a stranger, that he had a lien upon it, or that in any other way the plaintiff had not the right of action which he

at

at first appeared to have. But unless some answer were given to the case of property in the plaintiff and conversion by the defendant, the plaintiff must always recover. Bills of exchange and promissory notes must be governed by the same rule with other property. Merchants and tradesmen could have as little difficulty in shewing from whom and upon what consideration they received a 50*l.* bank-note, as if the matter in question were a horse or a piece of furniture of that value. The defendant was therefore bound to prove his title to this note, or the court and jury must presume that he got possession of it *malā fide*, and that in his hands it still remained the property of the plaintiff.

1809.
KING
v.
MILSON.

Lord ELLENBOROUGH. There is a distinction between negotiable instruments and common chattels. With respect to the former, possession is *prima facie* evidence of property. I must presume, that the defendant, when possessed of this note, was a *bonā fide* holder for a valuable consideration. It lies upon you to impeach his title. You might have thrown so much suspicion upon his conduct in the transaction, as to have rendered it necessary for him to prove from whom he received the note, and what consideration he gave for it. But I think you have not done so. The suspicious circumstances detailed by the witnesses may be accounted for from the defendant's ignorance. It would greatly impair the credit and impede the circulation of negotiable instruments, if persons holding them could, without strong evidence of fraud, be com-

\$ CASES AT NISI PRIUS.

1809. pelled by any prior holder to disclose the manner
in which they received them.

KING

MILSON.

Plaintiff nonsuited.

Garrow and Gifford for the plaintiff.

Park and Espinasse for the defendant.

[Attorneys, *Turner and Glynes.*]

A bank note, though stolen, becomes the property of him who gives valuable consideration for it, having no notice nor knowledge of the robbery. *Miller v. Race*, 1 Burr. 452. So, although the loser of a bill advertizes it in the newspapers, the person who afterwards *bona fide* discounts it for the fraudu-

lent finder, may recover upon it against the acceptor. *Lawson v. Weston*, 4 Esp. 56.—As to the peculiar nature of the property in negotiable securities, see the very profound and comprehensive argument of *Eyre*, C. J. in *Collins v. Martin*, 1 Bos. & Pul. 648.

ADJOURNED Sittings at WESTMINSTER,

1809.

GAINSFORD v. GRAMMAR.

I. nsd w.
Feb. 16.

GOODS sold and delivered. Pleas, the general issue, and the statute of limitations.

The goods had been delivered seven or eight years ago. To take the case out of the statute,

Mr. *Walls*, the defendant's attorney, was called, who stated, that about a year and a half ago, he carried certain propositions from the defendant to the plaintiff; there was not then, nor for several months after, any suit depending between the parties; but he then considered himself as acting in the capacity of attorney for the defendant, and he had since charged for his attendances as such.---

Q. "What was the nature of the propositions you made to the plaintiff, by order of the defendant?"

Park objected, that whatever the witness might have been instructed by the defendant to propose to the plaintiff on this occasion was a privileged communication between attorney and client.

A. having a demand upon
B, B before
A, commences
any action,
employs C, his
attorney, to
make certain
propositions to
A, upon the
matters in
difference be-
tween them.
C cannot be
examined as to
what B said
upon the occa-
sion, for this is
to be con-
sidered a privi-
leged communi-
cation be-
tween attorney
and client. But
what C said
when he made
the propositions
to A, is good
evidence
against B, with-
out further
proof of
C being
authorized by
him than the
fact of C being
his attorney.

Garrow, contra, cited *Cobden v. Kendrick*, 4 T. R. 431. and *Wilson v. Rastall*, Ib. 753. to shew, that unless

1809. unless the witness was really acting as attorney to the party at the time, he was bound to disclose what passed between them; and contended, that

GAINSFORD v. GRAMMAR. Mr. *Walls* was not employed on this occasion in his professional capacity, but was merely in the situation of a steward, or any other confidential agent, whose testimony was not privileged.

Lord ELLENBOROUGH. I fully accede to the doctrine laid down in *Cobden v. Kendrick*, and *Hillson v. Rastall*, which is no more than this, that communications by the party to the witness, whether prior or subsequent to the relation of client and attorney subsisting between them, are not privileged. But this relation may be formed before the commencement of any suit. The attorney may be retained, and considered in as such, in contemplation of a suit; and shall it be said that he is bound to disclose whatever has been revealed to him previous to the suing out or the service of the writ? It is clear that in this case *Walls* was employed as an attorney when he was directed to carry these proposals to the plaintiff.

Garraway then proposed to call another person who was present at the conversation between the plaintiff and *Walls*, to state what the latter then said.

Park insisted, that it was first necessary to prove that *Walls* had authority for this from the defendant.

Lord ELLENBOROUGH. It has been proved that he was then the defendant's attorney, and the law will

will therefore infer that he had authority for what he said or did upon this occasion.

1809.
GAINSBOROUGH
v.
GRAMMAR.

It appeared that *Walls* had made an offer from the defendant of 2s. 6d. in the pound, and this being considered a sufficient acknowledgment to take the case out of the statute, the plaintiff had a verdict for the amount of his demand.

Garrow and *Marryat* for the plaintiff.

Park for the defendant.

[Attorneys, *Lemage* and *Walls*.]

Vide Robson v. Kemp, 5 Esp. 52. *Brard v. Ackerman*, ib. 119. *Spenceley v. Schulenburgh*, 7 East. 357.

BALLS v. WESTWOOD.

Thursday,
Feb. 16.

USE and occupation.

It was proved that the defendant entered upon the premises in question (a copyhold tenement of the manor of Edmonton) under the plaintiff, to whom he had paid rent till within the last two years, and that he still continues in possession.

In an action for use and occupation, where the defendant has come in under the plaintiff, he cannot shew that the plaintiff's title has expired, unless he solemnly renounced the

plaintiff's title at the time, and commenced a fresh holding under another person.

J. Warren

1809. *J. Warren* stated as a defence to the action, that about two years ago this copyhold tenement had been regularly seized as forfeited into the hands of the lord of the manor, by process from the court-baron, and that the defendant having notice from the steward to pay the rent to the lord, had punctually done so ever since.

Lord ELLENBOROUGH. Did you by any formal act renounce the plaintiff's title? Did you divest yourself of the possession you obtained under the plaintiff, and commence a fresh holding under another person?

J. Warren answered, that such a form had been thought unnecessary; and contended, that as the defendant did not dispute the plaintiff's original title to the premises, he was at liberty to shew that that title no longer existed.

Lord ELLENBOROUGH. You may as well attempt to move a mountain. You cannot controvert the continuance of the title of the person under whose demise you continue to hold. The security of landlords would be infinitely endangered if such a proceeding were permitted. Had the defendant, upon the premises being seized by the lord of the manor, disclaimed holding of the plaintiff, and entered afresh under the new landlord, we might now enquire into the validity of the seizure, and consider who is legally entitled to the premises; but the same tenancy continues which was created by the

the original demise, and the tenant must still pay rent to the lessor whose title he then recognized.

1809.

BALLS

v.

WESTWOOD.

Verdict for the plaintiff.

Park and *Gaselee* for the plaintiff.

J. Warren for the defendant.

[*Attorneys, Duncombe and Wadeson.*]

But in *ejectment* by landlord against tenant, the tenant may shew that the landlord's title has expired; although he cannot be permitted to prove that the landlord never had any title. *England ex d. Sybarn v. Slade*, 4 T. R. 682.

In an action for use and occupation, where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. *Cobb v. Carpenter. Same Day.* The defendant entered upon a leasehold cottage, under J. S. who soon after mortgaged it to W. S., and in 1806, assigned the equity of redemption to the plaintiff. On the 18th of July

last W. S. assigned the legal estate in the premises to the plaintiff. The defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended that although a person having the equitable estate only, perhaps could not maintain use and occupation without privity of contract, yet the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him, so as to entitle him to two years rent. But Lord ELLENBOROUGH clearly held, that he could only recover rent for the period between the 18th of July and Michaelmas day 1808.—His lordship

1809.
 ~~~~~  
 BALLS  
 v.  
 WESTWOOD.

likewise ruled in the same cause, that the defendant, who just before he quitted had been distrained upon by the ground landlord for several years' ground rent, amounting to a much larger sum than was due to the plaintiff, could only set off a part of this sum proportioned to the period during which the plaintiff had the legal estate; and that the fact of the plaintiff having brought an ejectment for the same premises, laying a demise on the 18th July 1808, was no bar to the present action, but was only matter of special application to the court.

#### ADJOURNED SITTINGS IN LONDON.

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Saturday,  
 Feb. 25.

#### HOWELL Widow v. LOCK.

#### ACTION on a builder's bill.

A surveyor called on the part of the plaintiff stated; in cross examination, that he was her son in law, and that she carried on the business for the benefit of her late husband's estate. He was then asked, what interest he and his wife took under the will of the deceased?

*Park* for the plaintiff objected that the will itself should be produced.

*Garrow, contra,* insisted that he had a right to put the question, as this was to be considered an examination upon the *voire dire*.

Lord

In a regular examination upon the *voire dire*, before the examination in chief, a witness may be interrogated as to the contents of written instruments not produced; but this cannot be done after the examination in chief, although the only object of the questions then put be to shew, that the witness is interested.

**Lord ELLENBOROUGH.** The contents of written instruments may certainly be inquired into in an examination upon the *voire dire*; but if there is to be such an examination, it must take place in its due order---before the examination in chief. If at any time it appears incidentally that the witness is interested, I will strike out his evidence; but in cross-examination I cannot allow you the privileges of an examination upon the *voire dire*. The question is irregular.

1809.  
Howell  
v.  
Lock.

. The cause was afterwards referred.

. **Park** and **Comyn** for the plaintiff.

**Garraw** for the defendant.

[Attorneys, Vandreaden and Stratton.]

*Vide* the Queen *v.* Muscot, 10 Mod. 193. Turner *v.* Pearte, 1 T. R. 719. Botham *v.* Swinglers, Peak. Cas. 218. 1 Esp. Cas. 164. S. C.

### ADDERLEY *v.* COOKSON.

Saturday,  
Feb. 25.

**A**SSUMPSIT for carrying the defendant as a passenger in the *Devaynes* East Indiaman from Madras to England.

vice to pay the captain of a Company's ship by which he returns to England, more than the regulation sum for his passage, although it may have been usual to pay more.

The

There is no implied promise on the part of an officer in the East India Company's ser-

1809. The defendant was a lieutenant in the Company's service, and came home on *a sick certificate*.  
~~ADMIRALTY~~  
v.  
COOKSON. By an order of the court of Directors, officers of this rank coming home under these circumstances are to pay 1000 rupees and no more "for their passage and accommodation at the captain's table."

The defendant paid the amount of this sum in English money into court; but the plaintiff went for £145 more.

His case was, that for the regulation price, officers are only entitled to swing their cots in the *steerage*; that lieutenant Cookson had a cabin to himself; and that the sum demanded was not more than he received from others who enjoyed the same advantage; but it appeared that, on board the *Devaynes* during this voyage, no officers did sleep in the steerage; that the cabin occupied by the defendant would have remained empty, or been filled with stores if he had been excluded from it; and that he had not made any express promise to pay more than the 1000 rupees.

Lord ELLENBOROUGH. The order says nothing about sleeping in the *steerage*. Why then should the officers be confined to that part of the ship? Had any other person who would have hired this cabin been excluded from it by the defendant, and the plaintiff's profits had been thereby diminished, the case might have been different. But I see  
nothing

nothing to raise an implied promise on the part of  
this defendant to pay beyond the regulated sum.

1809.  
ADDERLEY  
*v.*  
COOKSON,

Plaintiff nonsuited.

*Park and Richardson* for the plaintiff.

*Garrood* for the defendant.

[Attorneys, *Eaton and Wilshen.*]

FORSTER and others, *v.* CLEMENTS.

Saturday,  
Feb. 25.

A SSUMPSIT for money paid: Plea, the general issue.

This action was brought by *Messrs. Forster, Lubbocks and Co.* bankers in London, to recover the sum of 100*l.* paid by them to the holder of a bill of exchange, accepted by the defendant *payable at their banking house.* The bill was drawn by one Hanley, payable to his own order, and when paid by the plaintiffs had his indorsement upon it.

In an action by bankers to recover the amount of a bill of exchange accepted by the defendant payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee, as well as the acceptance by the defendant.

*Paley*, (of counsel for the plaintiffs,) at first satisfied himself with proving the defendant's handwriting to the bill; that it was paid by the plaintiffs; and that the defendant had then no effects in their hands.

1809. Lord ELLENBOROUGH said he must go farther, and give evidence of the indorsement by Hanley, to whose order the bill was payable.  
 FORSTER  
 CLEMENTS.

Paley contended that *prima facie* the hand writing must be taken to be Hanley's, and that as it was the custom of bankers to pay a bill with the name of the payee written upon the back of it, a request from the acceptor must be understood for them to do so. When this bill was presented to the plaintiffs for payment, it appeared in a negotiable shape, and they were authorized to pay it without inquiring into the title of the holder.

Lord ELLENBOROUGH. If the acceptor of a bill of exchange makes it payable at a banker's, he requests the latter to pay it only to the payee or his order, and not to any person who presents it. If the banker pays it without ascertaining the indorsement to be genuine, it is at his own risk. The name of Hanley upon this bill may be forged; in which case, the plaintiffs have paid it in their own wrong.

Evidence was afterwards given of an acknowledgment by the defendant, that Hanley had indorsed the bill; and the plaintiffs had a verdict for the 100*l.*, but without interest, to which Lord Ellenborough said they had shewn no right.

[Attorneys, Crowder and Co. and Follett.]

*Vide Cheap v. Harley*, cited 3 T. R. 127. *Mead v. Young*, 4 T. R. 28.

ELIZABETH

1809.

ELIZABETH HUXHAM, Spr. v. SAMUEL SMITH.

Monday,  
Feb. 17.

POLICY of insurance upon goods, by the ship  
*Two Friends*, from London to Charleston.

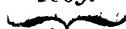
Plea, the general issue to all except £20. 14. 6.  
and as to that a tender.

It was admitted that the defendant had subscribed the policy for £100, and that a loss had happened of £76. 14s. 6d. per cent.

As a discharge for £56. the defendant put in the record of a cause in the Lord Mayor's court, wherein one *George Baker* was the plaintiff, *Eliza Huxham* was the defendant, and *Samuel Smith* the garnishee. From this it appeared, that upon a judgment of *quod habet*, *Smith* (the now defendant) had been ordered to pay £56. of the monies of *Miss Huxham* in his hands to *Baker*, and that there was an acknowledgment of satisfaction regularly entered.

*Park* objected to the validity of the attachment, on a suggestion that when the proceedings were instituted in the mayor's court, the policy was, and had ever since remained in the possession of one *Price*, who had a lien upon it; that *Smith* as garnishee, being in collusion with *Baker*, had admitted the policy, which could not otherwise have

To prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, is conclusive evidence. The record is only prima facie evidence that the debt for which the action was brought in the Mayor's Court, arose within the limits of the city.

1809.  
  
 HUXHAM been proved, and that he had paid *Baker* the £. 56 before final judgment, although at the trial a cause had been reserved for the opinion of the Recorder.

SMITH.

Lord ELLENBOROUGH. Supposing these facts to be true, I have not legal organs to see them. If the money was attached in the defendant's hands, and he paid it pursuant to the judgment of a court of competent jurisdiction, I must suppose *omnia rite acta*. Sitting at Nisi Prius, can I unravel the proceedings before the Recorder of London, and grant a new trial in the cause which he has decided? I must give credit to the record which is produced.

*Park* contended the defendant was bound to prove that *Baker* had a debt of £. 56 due to him from *Miss Huxham*, which arose within the city of London; and cited *Palmer v. Hooke*, 1 Ld. Raym. 727. as an authority in point.

The Common Serjeant (*Knowlys*) pointed out the hardship to which this would expose the garnishee. According to the mode of proceeding in the Mayor's court, upon the plaintiff's affidavit the debt was taken *pro confesso*, and *Miss Huxham* had an easy remedy if there was not a debt to this amount arising within the city, as by putting in bail at any time within a year and a day after final judgment, the attachment would be dissolved, *Baker* must return the money to the garnishee, and she might try the cause before the Recorder, or remove it into any of the courts at Westminster.

Lord

Lord ELLENBOROUGH. I think the judgment is *prima facie* evidence that the debt arose within the city; but this being a record of an inferior court, I will admit the defendant to prove the contrary.

A witness stated that Miss Huxham was a milliner at Charleston, and had ordered goods of Baker, a shopkeeper in Newgate Street, to be delivered on board a ship in the river *Thames*; that they were sent according to the order; but whether the ship which received them then lay within the bounds of the city, the witness could not tell.

Lord ELLENBOROUGH. That is immaterial. There was a delivery as soon as the goods were put in a course of conveyance. The debt certainly arose within the city, and might be sued for in the Mayor's court.

An objection was then started that the Christian name of the plaintiff in this suit was *Elizabeth*, while that of the defendant in the suit below was *Eliza*; but upon evidence that the plaintiff's attorney had called her *Eliza*, Lord Ellenborough said it was enough that she appeared to be known as well by the one name as the other, and the foreign attachment was at last allowed to operate as payment of £. 56.

The witness to prove the tender said he offered to pay the £. 20. 14s. 6d. to the plaintiff's attorney, but required at the same time to have a receipt in full, or that the policy should be delivered up to be cancelled.

1809.  
HUXHAM  
v.  
SMITH.

If a merchant abroad orders goods of a shopkeeper residing within the city of London, to be put on board a ship lying beyond the limits of the city, and the shopkeeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the Mayor's court as a debt arising within the city.

1809.

~~HUXHAM~~v.  
SMITH.

This was held to be insufficient; and the plaintiff had a verdict for the last mentioned sum.

*Park and Richardson* for the plaintiff.

*Knowlys, C. S.* for the defendant.

[*Attorneys, Sherwood and Rawlinson..*]

See the cases upon the law of *Foreign Attachment* brought together by Mr. Serjeant Williams; 1 *Saund.* 67 (1).

Tuesday,  
Feb. 28.

### MOORE v. CLEMENTSON and others.

THIS was an action for goods sold and delivered.

Although a factor sell goods as a principal, yet if before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person; in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor.

The defendants allowed that they had purchased and received from one *Green*, since deceased, woollen cloths, which were the property of the plaintiff, a Yorkshire clothier, to the value of £. 600; but they contended that they had a right to set off against this a debt due to them from *Green*, who had died insolvent.

*Green* was a factor and warehouseman in Bush Lane, and sold the goods in question to the defendants in the months of February and March, 1807, without mentioning the name of any principal. Before they were all delivered, however, one of the defendants asked *Green's* clerk "whose goods they were?" to which he answered, "*Moore's*; he is the manufacturer,

" manufacturer, and you may like to have them of him when *Green* is dead." The bills of parcels were in *Green's* own name. He was employed by a number of other clothiers in the country to dispose of their goods in town ; and it was known to the defendants that he was in the habit of acting as a factor. *Green* died in May, 1807, indebted to the defendants beyond the value of the goods in question.

1809.

MOORE

v.

CLEMEN-  
SON.

*Garrow* contended that the defendants under these circumstances had a clear right of set-off. They had dealt with *Green* as a principal, and the plaintiff having accredited him as such could not interpose to disturb the mutual rights subsisting between the parties. The conversation of the clerk only amounted to notice that *Moore* was the manufacturer ; the goods might subsequently have become *Green's* own property ; and at any rate, this notice came too late, as a considerable part of the goods had been previously delivered.

*Park, contra*, allowed that if the defendants were neither expressly told, nor had reason to believe, that in this transaction *Green* acted only as an agent, they were entitled to the set-off which they claimed ; but he insisted that what the clerk said amounted to express notice of *Moore* being the owner of the goods, and that independently of this, the general knowledge which they possessed of *Green* being in the habit of acting as a factor was sufficient to put them upon their guard, and to prevent them from giving him credit as a principal.

1809.  
 MOORE v. CLEMENT-  
 SON.

Lord ELLENBOROUGH. If the defendants had merely had a general knowledge of *Green* being a factor, this I think would not be enough to deprive them of the privilege they derived from his actually selling these goods as a principal. A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal with the sanction of the real owner, the purchaser who is thus led to give him credit shall on no account afterwards be deprived of his set-off by the intervention of any third person. But here, there was express notice to the purchaser before the contract was completed, that *Green* in this particular transaction acted only as a factor. No stress could be laid upon the form of the bill of parcels; and the communication by the clerk was amply sufficient to inform the defendants of the true relation in which the parties stood to each other. The vendor therefore might interfere at any time before payment. The defendants might have paid *Green*, who seems to have had an uncountermanded authority to receive the price of the goods. They did not do so; and as this is not a case of mutual credit, the set-off cannot be allowed.

Verdict for the plaintiff.

*Park* and *Fuller* for the plaintiff.

*Garrow* for the defendants.

[Attorneys, *Barrow* and *Suain & Co.*]

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*Vide* Waring *v. Farenick*, *ante*, Vol. I. 85. *Coates v. Lewis*, *ib.*

1809.

Tuesday,  
Feb. 28.

## CLEMENTI and others v. GOLING and others.

THIS was an action for pirating a musical composition called "*Heigh-ho!*" The declaration stated that the plaintiffs were proprietors of a certain book, being a musical composition, air and melody, known by the name of "*Heigh-ho!*" first printed and published within fourteen years now last past, the same being printed and published in a single sheet of paper; and that being such proprietors they printed and published for sale divers, to wit, 1000 copies of the said book, each of such copies being printed on a single sheet of paper, whereof they had sold 500 copies, and had the remaining 500 in their hands for sale; yet that the defendants wrongfully printed, published, and exposed to sale a great number, to wit, 1000 copies of the said book, each of such last-mentioned copies being printed on a single sheet of paper, and sold divers of the said last mentioned copies; whereby the plaintiffs were prevented from selling the copies so remaining in their hands as aforesaid, and had been greatly injured in their copyright in the said book. In the 2d count the song was denominated a writing instead of a book.—Plea, the general issue.

The composition in question was a song in an Opera called "*Two Faces under a Hood,*" the music of which was composed by Mr. Schield, and sold by him on the 12th December 1807, to the plaintiffs. They immediately published the whole in a body; and as "*Heigh-ho!*" proved a very popular air,

A musical composition published on a single sheet of paper is privileged as a book within 8 Ann. c. 19. § 1.

1809.  
CLEMENTI v. GOLDING. air, they soon after brought out this by itself on a single sheet, in the manner stated in the declaration. Under a conception which generally prevailed among music sellers, that by so doing, the plaintiffs had lost their exclusive property in this air, the defendants likewise published an edition of it in the same form, which had a considerable sale. The defendants had reprinted the original words which were from the pen of *Mr. T. Dibdin*; but it was the piracy of the music only which the plaintiffs complained of as an injury.

*Scarlett*, for the plaintiffs, contended that this musical composition was clearly protected as *a book* by 8 An. c. 19. The legislature by the word *book* could not be considered as meaning only a number of printed sheets bound up together, since they talked in sec. 2. of a literary composition as a book before it was printed at all. Although in some dictionaries a book is defined to be a volume, or a literary composition of sufficient length to make a volume, according to its original meaning, it signifies any writing, without reference to size or form; and it is so used by the most celebrated authors. Thus, in Shakespearc's HENRY IV. *book* (a) stands for the *indenture* or instrument, by which *Mortimer*, *Glendower* and *Hotspur* agreed to divide England between them; and the commentators

(a) *Mort.* "By that time will our *book*, I think, be drawn." Hen. IV. Part I. Act III. Scene I. The instrument is a

little before called an *indenture tripartite*. N. This is the same scene in which *moiety* is used for a *third part*.

upon

upon that passage point out various other instances in which the word is employed in the same sense. ---In actions upon this statute compositions of a single sheet have frequently been considered as within its protection. In *Storage v. Longman* (a), before Lord Kenyon, which was an action for pirating an Italian air published upon one sheet, the objection now relied upon was not thought of, and the plaintiff recovered. So another action was brought soon after, with the same success, for pirating the popular melody, "*Hope told a flattering Tale*," which was printed in the same form. In *Hime v. Dale* (b), before Lord Ellenborough, the point

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(a) *Storage v. Longman*. Sittings after M. T. 1788. The declaration stated that the plaintiff was composer of a musical air, tune and writing, and that it was reprinted by the defendant within the 14 years limited by the act, &c. Erskine for the defendant examined the plaintiff's sister, to shew that the song was composed to be sung by her at the Italian Opera, and that all compositions so performed were the property of the house, not of the composer. Lord KENYON said, that this defence could not be supported; that the statute vests the property in the author, and that no such private regu-

lation could interfere with the public right.

(b) *Hime v. Dale*. Sittings after M. T. 1803.

This was an action for pirating the words of a song called "*Abraham Newland*," published on a single sheet of paper. Lord ELLENBOROUGH was inclined to think that such a publication was not protected by 8 An. c. 19. as the word *book* only means in common acceptation a plurality of sheets, but is decidedly used in this sense in one clause of the statute itself. He therefore nonsuited the plaintiff, but reserved the point for the opinion of the court.

Erskine for the plaintiff moved  
next

1809. point was made, and his lordship nonsuited the plaintiff; but the court of K. B. afterwards set the nonsuit aside, and ordered a new trial.

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*Garrow*

next term for a rule to shew cause why the nonsuit should not be set aside. He contended that the legislature could never have meant to make the operation of the statute depend upon the type in which any composition is printed, or the form in which it is bound up. This song might easily have been extended over several sheets and rendered a duodecimo volume. In *Back v. Longman*, Cwp. 623, it was decided that music is within the act, and musical compositions most generally appear in this fugitive form. [Lord Ellenborough. In the case cited, the musical composition was a *sonata*, and a sonata may be a book.] It never occurred to the Lord Chancellor who directed the issue, or to Lord Mansfield, or any of the judges who decided the case, that the form of the publication could make any difference, and therefore it is not stated. If a different construction were put upon the act, many productions of the greatest genius, both in prose and verse, would

be excluded from its benefits. But, might the papers of the *Spectator*, or *Gray's Elegy in a country Church-yard*, have been pirated as soon as they were published, because they were first given to the world on single sheets? The voluminous extent of a production cannot in an enlightened country be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations which will inclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines; and is all this profundity of mental abstraction on which the security and happiness of the species in every part of the globe depend to be excluded from the protection of British jurisprudence? But there is nothing in the word *book* to require that it shall consist of several sheets bound in leather, or stitched in a marble cover. *Book* is evidently the Saxon *VOC*, and the latter term is from the *beech-tree*, the rind of which supplied

*Garrow* for the defendant said, that in *Hime v. Dale*, the Judges of K. B. had not given any express opinion

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the place of paper to our German ancestors. The Latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. *Book* may therefore be applied to any writing: and it has often been so used in the English language. Sometimes the most humble and familiar illustration is the most fortunate. The *horn book*, so formidable to infant years, consists of one small page protected by an animal preparation, and in this state it has universally received the appellation of *a book*. So in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the paper *book* or the demurrer *book*. In the Court of Exchequer, a roll was antiently denominated a *book*, and so continues in some instances to this day. An oath as old as the time of Edward I. runs in this form: "And you shall deliver into the Court of Exchequer a book fairly written, &c." But the book delivered into court in fulfilment of this oath has always been a roll of parchment.  
—*Rule nisi granted.*

In Easter Term following *Garrow* was proceeding to shew cause against the rule, when Lord Ellenborough said, the question was of so much consequence, that the court were of opinion the matter should be reconsidered, and then, by a special verdict, it might be ascertained, whether the piece was a book within the meaning of the legislature.

*Garrow*, without arguing that point then, begged to draw their lordships attention to the libellous nature of the song, and contended it was of such a description that it could not receive the protection of the law in whatever shape it had appeared. It professed to be a panegyric upon money; but was in reality a gross and nefarious libel upon the solemn administration of British justice. The object of this composition was, not to satirize folly or to raise the smile of innocent mirth, but being sung in the streets of the capital, to excite the indignation of the people against the sacred ministers of the law, and the awful duties they were appointed to perform.

The

**1809.** **CLEMENTI v. GOLDING.** opinion, and had ordered a new trial that the facts might be more distinctly found, and a question of such importance might receive the most solemn determination. He therefore proposed that a case should now be made for the opinion of the court.

Lord ELLENBOROUGH. I do not at present see why a composition printed upon a single sheet should not be entitled to the privileges of the statute. We say "*Sit liber Index*," without referring to a volume either printed or written. I was at first startled at a single sheet of paper being called a *book*; but I was afterwards disposed to think, that it might be so considered within the meaning of this act of parliament; and when the matter came

The mischievous tendency of the production would sufficiently appear from the following stanza; after hearing which the court would say whether the non-suit ought to be disturbed.

The world is inclin'd  
To think JUSTICE blind;  
Yet what of all that?

She will blink like a bat  
At the sight of friend Abraham Newland!

Oh! Abraham Newland! Magi-  
cal Abraham Newland!

Tho' Justice 'tis known  
Can see thro' a mill-stone.  
She cant see thro' Abraham

Newland!

Lord ELLENBOROUGH. If the composition appeared on

the face of it to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction. But I think the present case is not to be considered one of that kind.

LATRENCE, J. The argument used by Mr. Garrow on this fugitive piece as being a libel, would as forcibly apply to *The Beggar's Opera*, where the language and allusions are sufficiently derogatory to the administration of public justice.

The rule was made absolute; but the cause was not again carried down to trial.

before

before the court, the other judges inclined to the same opinion. Therefore, without putting the parties to the expence of a special case, which may be unnecessary, I will direct the jury to find for the plaintiff, and leave you to move the court, if on consideration, you think you can sustain your objection.

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Verdict for the plaintiff.

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. In the ensuing term *Garrow* moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. He argued that in construing this and every other act of parliament, the language must be understood in its usual and popular acceptation: but any common person would stare if he heard a loose sheet of paper denominated a book. A book was defined by lexicographers, and was universally used to signify, a volume, written or printed, consisting of several sheets bound up together. It was expressly so used by the legislature in this very act of parliament, which provides, that if any person shall print, reprint, sell or import any book, without the consent of the proprietor first had and obtained, such offender or offenders shall forfeit such book or books, *and all and every sheet or sheets being part of such book or books*, to the proprietor or proprietors of the copy thereof." Thus the statute best explained itself, and *book* must be taken in the same sense throughout the whole. There might be a good reason why the legislature should leave ephemeral productions appearing

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appearing upon a single sheet as they stood at common law. Authors of real merit very rarely gave their works to the world in this fugitive form; there was no absolute necessity for their ever doing so; and the trash which daily appeared on a loose sheet deserved no extraordinary protection or encouragement. But if the doctrine contended for on the other side were to prevail, the courts would soon have to try actions for pirating the substance of a hand-bill, or a piece of intelligence from a newspaper.

The JUDGES seemed unanimously of opinion that it could not depend upon the form of the publication, whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be *a book* within the meaning of the legislature; and that the verdict in the present action ought not to be disturbed.—*Garrow*, however, adverted to the magnitude of the property at stake, and stated it to be the earnest wish of the parties that a question of such importance to their trade should be more fully discussed. Upon this, the Court very reluctantly granted a rule to shew cause: but the defendants finding the opinion of the Judges so strongly against them, abandoned their rule, and it was afterwards discharged without argument.

*Scarlett* and *Richardson* for the plaintiff.

*Garrow* for the defendant.

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## DAGNALL v. WYLIE and another.

Wednesday,  
March 1.

THIS was an action by the indorsee against the acceptors of a bill of exchange for 411*l.* 5*s.* 4*d.* dated 24th August 1807, drawn by one *G. Smith*, payable to his own order, at two months after date.

The defence was,---*usury* in the formation of the bill.

*John Rimmer* swore, that on the 9th of May 1807, the defendants being pressed for money applied to him for a loan, and he advanced them about 1600*l.* For the repayment of 800*l.* part of this sum, he drew upon them, and they accepted two bills for 400*l.* each, at two months; which were antedated, May 1: These he discounted for them with his own money, taking a commission of 10*s.* per cent. above legal interest. On the 1st of July, the defendants being unable to provide for the bills which were to fall due on the 4th, applied to the witness for assistance: he agreed to let them have 800*l.* on the former terms, and he drew upon them a bill, which they accepted; for 811*l.* 11*s.* 4*d.* at two months,---the odd money being for the interest, commission, and stamp. This he discounted for them, giving them a cheque upon his bankers for 800*l.* Towards the end of August, the defendants being still embarrassed, once more applied to the witness, to enable them to take up the bill

If one acting as a broker, get bills discounted by another person at legal interest, the transaction is not usurious, however large, a commission he may himself receive. Therefore where the acceptors of a bill of exchange tainted by usury applied to the drawer to discount other bills for them, to enable them to take it up, and he agreed to get them discounted by another person on receiving for himself 10*s.* per cent. beyond the legal interest, and bills were accordingly accepted by them, which he got discounted pursuant to the terms of the agreement,---it was held that these bills were valid in the hands of a bona fide indorsee, although the person who got them discounted was liable to a penalty for taking excessive commission

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for 811*l.* 11*s.* 4*d.* which was to be due the 4th of September: he had no longer money himself; but he offered to get two other bills discounted for the same commission he received before: accordingly, the defendants, on the 24th of August, accepted two bills for this purpose, one for 411*l.* 5*s.* 4*d.* (the bill in question), and another for 410*l.* 6*s.*, making together 821*l.* 11*s.* 4*d.* Blanks were left in both for the name of the drawer, which were afterwards filled up with "*G. Smith.*" These bills the witness got discounted for lawful interest; but on account of a loss he met with in the failure of *Corson & Co.* he paid no part of the sum he received for them to the defendants, who never had any consideration for either of them. He swore, that the 10*s.* per cent. which he was to have for getting these two bills discounted, was intended as commission for his trouble as a broker, and not as interest for the loan of the money.

*Topping* for the defendants contended, that the bill on which the action was brought was void even in the hands of an innocent indorsee, being substituted for other bills tainted with usury, and being itself drawn to be negotiated on terms evidently usurious.

**Lord ELLENBOROUGH.** The May and July bills were certainly vicious; but what has polluted the bill on which the plaintiff seeks to recover? It was not discounted by *Rimmer* with his own money: he acted in this last transaction only as a broker. If he took more than 5*s.* per cent. he is liable to a penalty

penalty for taking excessive commission (*a*). There could be no usury, if the party who advanced the money received no more than legal interest at the rate of 5*l.* per cent. per annum.

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WYLLIE.

The plaintiff had a verdict.

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In the ensuing term, *Topping* applied to set aside the verdict, on the ground that the agreement upon which the bill was drawn was usurious : but the Judges were unanimously of opinion, that as *Rimmer*, who received the excess above legal interest, was not to discount the bill with his own money, there was no usury in the transaction, and therefore refused a rule to shew cause.

*Park* and *Marryat* for the plaintiff.

*Topping* and *Littledale* for the defendant.

[Attorneys, *Kearsey and Cooper & Lowe.*]

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(*a*) By 12 Ann. c. 16. § 2. it is enacted, that if any scrivener or broker take above the rate of 5*s.* per cent. upon any loan he transacts, he shall for every such offence forfeit 20*l.* and suffer imprisonment for half a year.

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Thursday,  
March 1.

## BROWN and others v. HODGSON.

Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped by order and on account of the consignee. The consigner cannot maintain any action against the ship owner in respect of the goods, as the property must be taken to have vested in the consignee from the time they were put on board the ship.

**T**HIS was an action against the defendant as owner of the ship *Mercurius*, on board of which the plaintiffs had shipped certain goods, to be carried from London to Tonningen. The goods were expressed in the bill of lading to be shipped "by order and on account of *Hesse & Co.* of Hamburg."

Before the *Mercurius* arrived at Tonningen, that place was declared in a state of blockade, and she was ordered by an English frigate to return home. On her arrival in the Thames, the captain, for the purpose (as was alleged) of getting rid of the cargo, and setting the ship at liberty to proceed on another voyage, made an affidavit that he believed the cargo to be *Danish* property (a). In consequence of this, the goods in question were unloaded by an order from the Court of Admiralty, delivered into the custody of the Admiralty Marshal, and afterwards libelled as lawful prize to his Majesty. However, by a decree of that Court, they were at last restored to the plaintiffs. The declaration averred that the captain made the affidavit knowing it to be false, and stated as special damage the injury the goods had suffered, and the expence the plain-

(a) An embargo had previously been laid upon all ships belonging to British ports, and hostilities soon commenced with that power.

tiffs had incurred by the consequent proceedings in the Admiralty Court.

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BROWN

v.

Honeson.

*Park*, for the defendant, contended, that at all events this action could not be maintained by the present plaintiffs, who had no property in the goods. The bill of lading stated them to be shipped *by order and on account of Hesse and Co.* Therefore the property vested in these persons the moment the goods were put on board the *Mercurius*. If the defendant or his agent had acted improperly with respect to the goods, *Hesse and Co.* only had been injured, and they only could be heard in a court of justice to complain of the injury. The plaintiffs might recover the value of the goods from the consignees, whatever became of them after they were shipped; and if the defendant should afterwards be sued by *Hesse and Co.* for the same cause, a recovery against him in this action would be no bar. In *Dawes v. Peck*, 8 T. R. 330, it was held, that if the consignor of goods has delivered them to a particular carrier by order of the consignee, the consignor cannot maintain an action against the carrier for the loss of them; and *Dutton v. Solomonson*, 3 Bos. & Pul. 582. decided, that a delivery of goods by the vendor on behalf of the vendee to a carrier *not named* by the vendee, is a delivery to the vendee, so as to render him liable for their value, whether they ever reach him or not.

*The Attorney General*, contrà, took a distinction between goods sent from one part of England to another, and goods sent from England to a foreign

1809. country. In the former case, a delivery to the carrier was a delivery to the consignee ; but in the latter, the risk was still the consignor's till the goods reached their destination. A merchant abroad said, " if you will deliver me goods at such a port, I will take them at such a price." Thus the property remained in the consignor till actual delivery, and he was in the habit of insuring the voyage. If the goods arrive safe, they are to be paid for ; aliter, if they do not. That the goods in question remained the property of the plaintiffs when the false affidavit was made, appeared clearly from this fact, that they were restored to them by the Court of Admiralty.

Lord ELLENBOROUGH. The goods are shipped by *order and on account of Hesse and Co.* I can recognize no property but that recognized by the bill of lading. This action cannot be maintained.

Plaintiff nonsuited.

*The Attorney General and Gaselee* for the plaintiff.

*Park, Marryat, and Selwyn* for the defendant.

[Attorneys, *Gregson & Dixon* and *Atcheson & Morgan.* ]

1800.

## SANSOM and others v. JAMES BELL.

Friday,  
March 3.

THIS was a writ of inquiry of damages, under stat. 8 & 9 W. 3. c. 11. The plaintiffs declared in debt on bond, dated 17th March 1803, for 20,000*l.* The defendant pleaded a former recovery; and there was judgment for the plaintiffs on an issue of *nul tiel record.* They then set out the condition of the bond, which, after reciting that they had agreed to accept bills of exchange to be drawn upon them by one *W. Bell* to the amount of 10,000*l.*, for which the said *W. Bell* had agreed to remit to them good bills of exchange, or notes, to answer the payment of all such bills to be drawn as before-mentioned as they should respectively become due; and that the defendant and one *Hugh Bell*, in order to secure the plaintiffs against such acceptances as they might be under for the said *W. Bell*, had agreed to join with him in that bond of indemnity; ----- was declared to be, that if the said *W. Bell* should well and truly pay or cause to be paid unto plaintiff all such sum and sums of money as he should or might thereafter owe or stand indebted to them by reason or on account of their being so under acceptances for him the said *W. Bell*, or on any other account thereafter to subsist between them the said *W. Bell* and the plaintiff, when and as the same should become due and payable, or in default thereof, in case defendant and the said *Hugh Bell*, or either of them, should and did, within one month next after demand thereof, well

The recital in the condition of an indemnity bond, professing to state the agreement between the parties, does not confine the responsibility of the sureties to the limits therein specified.

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SANSOMv.BELL.

and truly pay or cause to be paid such sum and sums of money to the plaintiffs, not exceeding in the whole the sum of 10,000*l.* and also well and sufficiently indemnify plaintiffs on account of their being so under acceptances for the said W. Bell in manner aforesaid, or on any other account to be thereafter subsisting between the said W. Bell and the plaintiffs, then the said writing obligatory to be void, &c. Several breaches were suggested in the usual form.

The only question between the parties was, whether the indemnity was confined to one set of acceptances to the amount of 10,000*l.* or extended to a balance of that sum upon a running account.

*Gaselee* for the defendant contended, that the indemnity could not be carried beyond the first 10,000*l.* The recital expressly limited the amount of the acceptances to 10,000*l.*; and it was there that the real agreement of the parties was to be looked for. The words were enlarged by the condition itself to any account thereafter to subsist; but that must be referred to the foregoing agreement. It had been decided, that as against a surety, the condition of a bond could not be carried beyond the limits marked out in the recital. Thus, in *The Liverpool Waterworks Company v. Atkinson*, 6 East. 507, where the condition of the bond recited, that A. had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulated, that "at all times thereafter during the continuance of such his employment, and for so long time as he should continue to be employed,

*employed, he should justly account, &c.*" The obligation was held to be confined to the twelve months mentioned in the recital: So in *The Warden of St. Saviour Southwark v. Bostock*, 2 N. R. 175, where sureties were bound for the collector of a church-rate accounting "for all monies collected or received by him on account of the said rate, as also on all and every other rate or rates thereafter to be made and collected by him," it was held, that the sureties were only answerable for his accounting during one year, because such appeared to be the meaning of the parties as expressed in the recital of the condition.

Lord ELLENBOROUGH. I fully accede to these cases. They apply to the time for which sureties shall be liable, and where this is definitely marked out in the recital of the condition, it is not to be extended by any subsequent general words. Here had the condition only referred to the acceptances mentioned in the recital, I should have thought the defendant liable for one set of bills accepted by the plaintiffs on account of W. Bell, and no more. But a new subject matter is afterwards introduced; and the guarantie is extended to *any other account thereafter to subsist between them*, without any limitation of time, or restriction as to the nature of the transaction. An expanded liability is thus created. --The inquiry must be taken for all such sums to the amount of 10,000*l.* as the plaintiffs can shew to be on any account due to them from W. Bell.

Verdict accordingly.

Dampier

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*Dampier and Moore* for the plaintiffs.*Gaselee* for the defendant.[Attorneys, *Bleasdale and Westons.*]

All the authorities upon this subject will be found referred to in the two cases above cited.

Saturday,  
March 4.

## VAN OMEROON v. DOWICK and others.

Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven, for the benefit of the shippers; and if he does so, though acting bona fide for the interest of all concerned, this is a tortious conversion, for which the ship-owner is liable.

THIS was an action against the defendants as owners of the sloop *Ranger*, on a bill of lading signed by their captain, for two cases of cutlasses, to be carried from England to Surinam, "the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted."

The *Ranger* sailed in June 1807, under convoy of the *Julia* sloop of war, with a large fleet for the *West Indies*, among whom were four vessels for *Surinam* besides herself. She strictly followed during the voyage the directions of the commodore, whose duty it was to inform different ships when they were to separate for their respective ports of destination. Through the error of the commodore, the Surinam ships got to leeward of that settlement, and having ineffectually attempted to beat up to windward,

windward, were forced to put into Demerara in the end of August, and to remain there till the month of December, when a ship of war came to see them back to Surinam. They sailed with her; but after nine or ten days beating about, were carried farther to leeward. The commodore then finding the attempt hopeless, ordered them to make for Tobago or Grenada. The Ranger put into the latter island, where the goods in question were sold by public auction, under the directions of the captain.

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*The Attorney General* for the defendant contended, that the captain, under such difficult circumstances, was to be considered the agent of the shipper as well as the ship-owner, and that he had a discretionary authority to do what was best for all concerned. But it was clearly for the benefit of the plaintiff that the cutlasses should be sold at Grenada, since they could not be carried to Surinam. He could therefore only claim the sum for which they were sold, and this action could not be maintained. The defendants had not been guilty of any breach of their undertaking, for the ship had done every thing that was possible to reach Surinam, and had been prevented from delivering the goods there by one of the risks excepted in the bill of lading.

*Lord ELLENBOROUGH.* I am decidedly of opinion that you had no right to sell the goods. Expediency might require this step; but the captain could not put himself in the situation of the owner of the goods; and when he thus disposed of them,

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in point of law he was guilty of a tortious conversion. Whatever power he might have to sell a part of the cargo for repairs, he could not lawfully put a stop to the voyage; and it is difficult to say that there was a natural impossibility of proceeding to Surinam.

On proof that goods which cannot be exported without a licence, were entered for exportation at the custom-house, it will be presumed that there was a licence to export them.

An objection was then stated, that cutlasses are contraband of war, the exportation of which is prohibited without a licence from the king, and that no such licence was here produced.

Lord ELLENBOROUGH said, if it were proved that these cutlasses were entered at the custom-house, he would presume *omnia rite acta*.

A Judge at Nisi Prius will not take judicial notice of the King's proclamations.

No evidence of this fact could be found: but it turned out, that by 33 G. 3. c. 2. the king is only authorized to prohibit the exportation of implements of war by proclamation; and the defendant not being prepared with the gazette containing the proclamation for this purpose, the plaintiff had a verdict (*a*).

*Garraw and Le Blanc* for the plaintiff.

*The Attorney General and Wigley* for the defendants.

[Attorneys, *Shawes & Le Blanc*, and *Willett & Annesley*.]

(*a*) *Vide Rex v. Holt*, 5 T. R. 436. Bul. N. P. 226. *Parkin v. Dick, post.*

1809.

## PEACOCK v. PEACOCK.

Saturday,  
March 4.

**T**HIS was an issue out of Chancery, to try whether the plaintiff was beneficially a partner with the defendant during the last five years, and if he was, for what share not exceeding one moiety of the profits.

The defendant is a law stationer, who has for many years carried on that business to a great extent in Chancery Lane. The plaintiff is his son, and was bred up by him in the same business. In March 1803, the plaintiff came of age, when his father said to him, " You shall have 15s. a week till October ; the books will then be made up, and you shall have a share ; we need not talk of the share till October comes ; we shall settle it then." Soon after, he told his apprentices, that his son being now of age would be as much their master as himself. When the 1st of October arrived, he changed the firm, wrote Peacocks over his door, opened a new set of books, and from that time in every possible way represented his son as his co-partner. The latter likewise acted in all respects as a partner, and applied to business with assiduity and steadiness. But no settlement ever took place as to what share the son should have. Till 1806 he continued to take only 15s. a week from the receipts. The defendant then said, that from not keeping regular accounts he did not know what his profits were, and could not ascertain the share his son should have ; but that till some arrangement

A father established in business, on his son's coming of age, tells him he shall have a share in it, and holds him out to the world as his co-partner : The son acts as such for several years, but there is never any thing settled as to the particular share which he shall have. — Under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers ; but not that the son is entitled to a moiety of the profits, and it will be referred to a jury to say, to what share he is reasonably entitled.

was

1800.

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v.

PEACOCK.

was formed his son should take £. 1. a week, and he himself should take £. 8. a week, out of which he was to defray the expences of the establishment. They went on nearly on this footing till within a few months back; when a quarrel taking place, the father turned the son out of doors, and took in another partner, giving him a third of the business. The son then filed a bill in Chancery against the father as his co-partner, for a discovery and to account. The father in his answer denied the existence of the partnership; whereupon this issue was directed.

*Park* for the plaintiff contended that he was clearly a partner with his father, and that as the share to which he was entitled was left indefinite, the law must presume it to be a *moiety*.

*The Attorney General contra*, insisted, that although there was a partnership as between them and the rest of the world, yet as no terms of partnership were ever agreed upon, *inter se* the son was merely his father's servant, and entitled as such to a compensation for his work and labour.

Lord ELLENBOROUGH. The fiftieth part of the evidence adduced would have been sufficient to establish a partnership as between these parties and the rest of the world. This being established, the presumption of law is, that they are partners *inter se*. Such presumption might have been repelled. A man who renders himself liable to third persons as a partner, may in truth be the mere agent or servant of his supposed co-partner, and entitled only to fixed wages. But in the present case, the presumption

presumption of law, instead of being repelled, is confirmed. The defendant evidently gave his son a beneficial interest in his business, leaving the amount to be settled when the books should be balanced. There is no pretence however for saying that the plaintiff is entitled to *a moiety* of the profits; and the jury must consider what is a fair and just proportion for the father to give, and the son to expect, after what has passed between them.

1809.  
PEACOCK  
v.  
PEACOCK.

The jury found that, since October 1, 1803, the plaintiff had been entitled to a *fourth* part of the profits of the partnership trade.

*Park, Marryat and Best* for the plaintiff.

*The Attorney General, Currow and Richardson,*  
for the defendant.

{Attorneys, Peacock and Kaye & Freshfield }

1806.

Monday,  
March 6.JACKSON and others, assignees of ROBINSON,  
a bankrupt v. IRVIN and others.

A warrant, under *c. 1. & 2. 6. 11.*, against the goods of a trader is directed to his servant and another person as special bailiffs. They in consequence take possession of the goods in the shop, but the business of the shop, though without the trader's interference, remained apparently as usual. While thus engaged, it was observed that the goods passed under the commission of the assignees, as the position of the servant was the possession of the master and the goods were thus in the possession of the assignees, and dismissed of the bankrupt at the time of the bankruptcy.

## TROVER for goods taken in execution under a judgment against the bankrupt at the suit of the defendants.

*Robinson* was a mercer at Whitehaven in Cumberland. The defendants were his bankers, and to secure certain advances which they had made on his account, he gave them a warrant of attorney. Upon this they entered up judgment, and sued out a writ of *sicri facias*, indorsed to levy £. 4,000. There being no bound bailiffs in the County of Cumberland, the warrant from the Sheriff was directed to *T. Thompson* and *R. Strickett*, two of *Robinson*'s shopmen. The warrant was delivered to them on Saturday the 7th of May 1808, and they were desired to take possession of all *Robinson*'s stock in trade under it. There was evidence, which was contradicted, that *Thompson* had left *Robinson*'s service six weeks before. Having got the warrant, *Thompson* and *Strickett* remained in the shop till night, when they locked it, and carried away the key. But on the Monday morning, they again opened it, and although *Robinson* did not interfere, business was carried on apparently as usual. On the evening of this day, *Robinson* committed an act of bankruptcy by assigning all his effects by deed to *Jackson*, one of the plaintiffs. A commission of bankrupt was sued out against him the 14th of the same month, on the petition of

of one *Ritson*. The goods were afterwards sold by public auction under the warrant, *Thompson* and *Strickett* having remained in possession from the time it was delivered to them---The question, of course, was, whether the bankruptcy should override the execution?

1809.  
JACKSON  
r.  
IRVIN.

Lord *ELLENBOROUGH*: How can the possession of the servants be adverse to that of their master? Even supposing that *Thompson* had left Robinson's service before the execution, still *Strickett* continued in it; and as he was tenant in common with the other, there was a continuance of the master's possession through him. The goods were certainly in *the possession, order, and disposition* (*a*) of the <sup>(a) 21 Jac. 1.</sup>  
<sup>c. 19. § 11.</sup> bankrupt when the bankruptcy happened, and therefore passed to his assignees, notwithstanding the execution. I remember an execution in the north, where the warrant was delivered to a gentleman's butler, who continued to serve up wine, and to wait at his master's table as before. The Court has more than once expressed an opinion, that there ought to be bound bailiffs in Cumberland as in other counties. They seem to have supposed here, that a possession *aliene* to the master's dissolved the relation between him and his servants; but they were wrong in point of law. Had they delivered the warrant on the 7th, to a bound bailiff, and put him in possession, all would have been right.

*Topping* for the defendants then objected, that A trader commits an act of bankruptcy, by assigning all his stock in trade to A, who is a party to the deed of assignment. Although A cannot himself sue out a commission of bankruptcy against him, upon this act of bankruptcy, he may act as an assignee under commission sued out upon it by a third person.

1809.  
 JACKSON  
 v.  
 IRVIN.

ment relied upon as an act of bankruptcy was to *Jackson*, the plaintiff, who could not complain of a deed to which he was a party.

**Lord ELLENBOROUGH.** *Jackson* could not have been the petitioning creditor; but there is nothing to prevent his acting as an assignee under a commission sued out on the petition of another person who was no party to the deed (*a*).

In an action by the assignees of a bankrupt, upon proof that the petitioning creditor's debt once existed, the law will presume that it continued down to the time of the bankruptcy.

An objection was likewise taken to the evidence of the petitioning creditor's debt.---An entry in the bankrupt's books was relied upon, made some months before the act of bankruptcy. This stated him to be then indebted to *Ritson* above 200*l.*; but there was no evidence that the debt continued down to the time of the bankruptcy. However,

**Lord ELLENBOROUGH** held, that the debt being proved to have once existed, its continuance would be presumed.

The plaintiff's had a verdict.

*The Attorney General, Garrow, Park, and Scarlett*, for the plaintiffs.

*Topping, Littledale, Raine, and Richardson*, for the defendants.

[*Attorneys, Clennell and Falcon.*]

(*a*) In *Bamford v. Baron*, 2*T.R.* 394, *n.* in which it was decided, that they who are privy to a fraudulent deed of assign-

ment cannot set it up as an act of bankruptcy, the commission was sued out by the very persons who were privy to the deed.

1809.

## COHEN v. HINCKLEY.

Monday,  
March 6.

THIS was an action on a policy of insurance on the ship Union, at and from Portsmouth to Quebec. The declaration stated, that after the ship set sail from Portsmouth, and before her arrival at Quebec, she was wholly lost by the perils of the sea.

As the plaintiff's case was at first shaped, the only evidence of the loss was given by the plaintiff's son, who swore, that on the 8th or 9th of May 1806, he saw the Union at Stoke's Bay, going out with other ships for Spithead, and that she had never afterwards been heard of.

*The Attorney General* objected, that this did not prove that the ship ever sailed from Portsmouth, and still less that she ever sailed for Quebec.

*Garrow* contended, that it was the best evidence the nature of the case admitted of; that the presumption from the facts proved was, that the ship had perished on the voyage to Quebec, and that the policy being "at and from Portsmouth," the loss was covered by it, even supposing that the ship sunk while she lay there.

*Lord Ellenborough.* Even in that case you must have shewn, that she was *at Portsmouth*, on the voyage insured. But the declaration states, that

In an action on a policy of insurance, where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the plaintiff must prove that when she left the port of outfit she was bound upon the voyage insured. For this purpose the *committ bond*, mentioning the port of destination in the common form, is *prima facie* evidence.

1809.

COTTON

v.

HINCKLEY.

the loss happened after the ship sailed from Portsmouth to Quebec. You must give some evidence that she sailed from the one place to the other. But when she left Stoke's Bay, how do I know that she was not bound to the East Indies? If you could shew that she had a particular destination by charter-party, I should presume that she sailed on the chartered voyage; or if you could shew that she was cleared out for a particular port, I should presume that she set sail for it when she dropped from her moorings. But you have laid no foundation for any presumption upon this subject, either one way or another.

The *convoy bond* was then put in, which had been executed at the custom-house by the plaintiff as owner, and Christopher Rowland as Captain of the Union, on the 28th of April 1806. In the body of this instrument no mention whatever is made of the place to which the ship was bound, the parties merely engaging that she should not sail without, nor depart from, convoy without leave; but at the bottom of it these words were written—“*Convoy bond for Quebec.*” An officer from the customs stated, that it was according to the course of office to write these words upon the bond, and that though he did not personally know of any act of office being done upon it, he had no doubt that a certificate and other papers for a voyage to *Quebec* were delivered to the captain before he sailed.

Lord ELLENBOROUGH. I think this is sufficient *prima facie* evidence that the ship sailed on the voyage insured.

It

It afterwards appeared, however, that she sailed without convoy, and that the plaintiff was privy to this fact, so that by 43 G. 3. c. 57. s. 4. the policy was vacated, and the defendant had a verdict.

1809.  
COHEN  
v.  
HINCKLEY.

*Garrow, Topping, and Taddy* for the plaintiff.

*The Attorney General and Park* for the defendant.

[*Attorneys, Palmer & Co. and Credar & C.*]

*Vide Green v. Brown*, 2 Stra. 1199. Newby 1. Read, Park, 85. 6th ed. *Twemlow v. Oswin*, *post*.

BORRODAILE and another q. t. v. MIDDLETON.

Tuesday,  
March 7.

THIS was an action for usury against the same defendant, and upon the same transaction, as in the case of *Brooke q. t. v. Middleton*, *ante*, vol. I. p. 444. The declaration now stated, that the defendant forbore to *Wilkins and Lacy* the sum of 242*l.* 7*s.* from the 21st [instead of the 20th] of April 1807, to the 5th of November following.

In an action for usury, the forbearance was laid to have been from the 21st of April. On that day, the borrower received from the defendant, as part of the sum lent, a cheque, which was void for want of a stamp.

This the borrower the same day paid into his bankers, who immediately gave him credit for the amount, but who did not themselves receive payment of it till the following day.—Held, that as to this sum there was no forbearance till the 22d, and that there was thus a fatal variance between the declaration and the evidence.

It was proved, that *W. and L.*, on the 21st of April, received in London a letter from the defendant,

his bankers, who immediately gave him credit for the amount, but who did not themselves receive payment of it till the following day.—Held, that as to this sum there was no forbearance till the 22d, and that there was thus a fatal variance between the declaration and the evidence.

1809.

BORRO-  
DAILE  
v.  
MIDDLE-  
TON.

dant, sent from Frome in Somersetshire on the 20th, containing various cash notes for the sum of 242*l.* 7*s.*, and that, on the 21st they actually received cash for the whole of them, *except one*. This was a cheque for 26*l.* 8*s.* upon Messrs. Hammersley and Co. bankers in London, drawn by Lord Cork at Frome, payable to one John King. The paper on which the cheque was drawn was un-stamped. *W.* and *L.* on the 21st paid it into their bankers, Sansom & Co. who immediately gave them credit for the amount. But Sansom & Co. did not present it for payment till the 22d. On that day it was duly paid by Hammersley & Co.

*The Attorney General* objected, that as to this sum of 26*l.* 8*s.* there could be no forbearance from the 21st, and that there was still a fatal variance between the declaration and the evidence. The cheque being drawn by Lord Cork at such a distance from the bankers who were to pay it, was void. Therefore, the facts of its being remitted to *Wilkins and Lacy*, and its being paid in by them to their bankers, went for nothing, and there was no loan or forbearance by the defendant of the 26*l.* 8*s.* till the 22d of April.

*Garrow, contra*, contended, that though Lord Cork would not have been liable upon this cheque, the defendant was precluded from contesting its validity after he himself had sent it as cash, it had been received as cash by *W.* and *L.*, and their bankers had given them credit on the strength of it. Thus, in fact, it had operated as cash, and being

being regularly paid, the forbearance might well be laid from the 21st, when *W.* and *Z.* found it available for 26*l.* 8*s.*

1809.

BORRO-  
DAILE  
*v.*  
MIDDLE-  
TON.

Lord ELLENBOROUGH. The cheque was void in its creation. It is a mere blank. I have not legal optics to see its existence. Money was paid on the 22d, and it was from that day only that the forbearance commenced as to this sum. The cheque is a mere nullity. If it had been lost on the 21st, it would have been the loss of a piece of straw. I should have been disposed to reserve the point had I thought it doubtful; but my opinion is so clear, that I must direct the plaintiff to be called.

Nonsuit.

*Garrow, Jervis, and Marryat* for the plaintiffs.

*The Attorney General and Lawes* for the defendant.

[*Attorneys, Walten and Swan.*]

1809.

Wednesday,  
March 8.

*A.* sold to *B.* all the hemp that might be shipped on board certain vessels at Riga, not exceeding 500 tons, by *C.* the agent of the concern.—*C.* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons, Held, that the contract must be confined to such hemp as *C.* should ship as agent to *A.*, and that *A.* was not answerable to *B.* for more than the 71 tons.

### HAYWARD and others v. SCOGGALL and others.

THIS was an action for the non-delivery of hemp.

The agreement between the parties upon this subject was as follows : “ Sold for Messrs. Scougall & Co. to Messrs. Hayward & Co. all the sound merchantable Riga Ryne hemp that may be loaded by the Pilgrim, Webster, and one or two other ships, not exceeding 300 tons, now at Riga, *by the supercargo of the said vessels, or Messrs. Schmids & Co. the agents of the concern*, the names of the ships to be given up when received, at 81*l.* per ton, &c.”

The names of two other ships were subsequently mentioned, pursuant to the agreement; but when they arrived, along with the *Pilgrim*, it appeared, that although Messrs. Schmids had loaded each of them with a full cargo of hemp, they had shipped by them not more than 71 tons on account of the defendants. This quantity was delivered to the plaintiffs; and the question was, whether the defendants were not bound to deliver 300 tons, so much having been shipped on board of these vessels by Messrs. Schmids at Riga. It appeared that these gentlemen are agents for various other Russia merchants, besides the defendants.

*The*

*The Attorney General* for the plaintiffs contended, that it was immaterial on whose account the hemp might have been shipped. The agreement purported an absolute sale of all that should be loaded by Messrs. Schimids to the amount of 300 tons. It was the same as if the agents had never been mentioned, and there had been simply a sale of the cargo of the ships named. This agreement might be improvident, but the defendants could not escape from it. If a man voluntarily covenanted to do what was impossible, he was liable for a breach of his covenant. This was precisely like the case tried yesterday, in which Lord Ellenborough held, that a man was liable upon such a contract, although he had actually purchased the hemp at Petersburgh, and he was prevented from delivering it in this country, from its being seized and confiscated by the Russian government (a).

Lord

(a) *Splidt v. Heath and others.*  
*Guildhall Sittings, 7th March*  
*1809.* Action for not delivering certain quantities of Petersburgh hemp, sold by the defendants to the plaintiff, *to be shipped on or before the 31st of August, old style,* by ship or ships, the names of which were to be given up when known. The Wilberforce and the Alfred were afterwards mentioned as the names of the ships; but they arrived with only a very small

portion of the hemp on board. It was stated by way of defence, that the defendants had prepared a full cargo of hemp for these two ships, which would have been much more than sufficient to satisfy the contract; but that while it was coming down in lighters from Petersburgh to Cronstadt, it was seized by the Russian government, and confiscated as British property; and that the ships which were to have taken it on board were obliged

1809.  
 HAYWARD  
 v.  
 SCOGGALL.

1809. Lord ELLENBOROUGH. As all the hemp which  
 HAYWARD the Schmids were to ship at Riga was not to belong  
 r to the defendants, this renders it improbable that  
 SCOGGALL they should mean to sell what was not their own.  
 In the case alluded to, the party had agreed to ship  
 and deliver a certain quantity of hemp, and, to be  
 sure, nothing could excuse him from doing so.  
 But here the defendants only sold what they sup-  
 posed their agents would ship for them. No doubt  
 they expected Schmids & Co. to ship at least 300  
 tons of hemp on their account ; but they were  
 disappointed. They seem to have contemplated  
 the possibility of this. They say, in substance,  
 " We will sell you all that our agents at Riga ship  
 for us, to the amount of 300 tons. If they send us  
 so much you shall have it ; if they send us none,  
 we have sold none to you." The words employed  
 are by no means strong enough to intimate, that  
 they had undertaken to sell that which did not  
 belong to them, and over which they had no con-  
 trol. They only refer to the hemp shipped by  
 Schmid & Co. as their own agents. " Agents of

(4) 10 East. 530. to cut their cables and put to sea, to avoid the embargo. It was argued, therefore, that the defendants were not liable for the effects of the confiscation and embargo, which had prevented the hemp from being shipped by the 31st of August. But Lord ELLENBOROUGH said this case was decided by Atkin-

son v. Ritchie (*a*), which was likewise a case of extreme hard-ship, and as the defendants had absolutely engaged that the hemp should be shipped, they were liable for this not being done, from whatever cause the circumstance had arisen.—The plaintiff had a verdict.

the

the concern," must mean agents *quoad hoc*, not general agents in the Baltic trade.

Plaintiffs nonsuited.

1809.  
HAYWARD  
v.  
SCOGGALL.

*The Attorney General, Garraway, and Taddy* for the plaintiffs.

*Park, Topping, and Richardson* for the defendants.

[*Attorneys, Kaye & Freshfield and Dennett & Greaves.*]

### PARKIN v. TUNNO.

Thursday,  
March 9.

THIS was an action on a policy of insurance on goods on board the ship *Laurel*, "at and from Bristol to Monte Video, and any other port or ports in the river Plate, in possession of the English." The plaintiff went for an average loss by the perils of the sea.

The ship sailed from Bristol on the 15th July 1807, with the goods insured, consisting of bottled porter, cheese, and other provisions. When off the coast of Brazil, she encountered several very heavy gales of wind, and was in danger of found-

If a ship insured, on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. Goods insured to A., that port being in the hands of the

enemy, are carried to B; and afterwards to C. Their condition being here inspected for the first time from the original sailing of the ship, they are found to be almost entirely destroyed by sea-damage, which might have happened partly in the voyage to A. or entirely in passing from A. to C. The underwriters are not liable for any part of this loss, there being no distinct evidence that the goods were injured while they were protected by the policy.

dering.

1809.  
PARKIN  
v.  
TUNNO.

dering. On the 15th of October, the weather having moderated, she entered the river Plate. By this time, Monte Video and every other place in the river Plate, except Maldonado, were in the hands of the Spaniards, with whom we were then at war. The Laurel sailed for Maldonado; but upon her arrival off that port, she was immediately ordered to sea by the English commander there, without being able to unload any part of her cargo, or to receive any repair. She then made for Rio Janeiro, as the nearest place of safety; and having taken in water, she proceeded from thence to Trinidad, where she arrived on the 12th of January 1808, after a very tempestuous passage. Now, for the first time since her leaving Bristol, her hold was opened, and her cargo inspected. The bottles which had contained the porter were found almost all either broken or empty, and the cheese and other provisions so much injured by the salt water, as to be of little or no value. But the witnesses examined were unable to ascertain when the goods had suffered in this manner. They said, that while off Brazil the Laurel shipped a great deal of water, and that the damage was probably done partly before she reached Maldonado, and partly in the subsequent portion of the voyage.

*The Attorney General*, for the plaintiff, first contended, that the underwriters were liable for all the damage which should be supposed to have happened to the goods till the ship's arrival at Rio Janeiro. As all the places of her destination, except Maldonado, were in the hands of the enemy, and

and she was prevented from landing her cargo there by the English commander, whose orders she was bound to obey, the goods were still protected by the policy till she reached a place of safety.

1809.  
PARKIN  
TUNNO.

Lord ELLENBOROUGH. The ship's going to Rio Janeiro might be the most prudent measure that could be taken under the circumstances; but I am clearly of opinion, that the underwriters were off the policy the moment she sailed from Maldonado. They undertook to indemnify the assured for any loss that should happen in a specific voyage, and their undertaking cannot be enlarged by implication, however necessary it might be that the voyage should be altered. I cannot add to the terms of the policy, "or if the said ship cannot enter any port in the river Plate, then till she shall reach a port of safety elsewhere."—For any damage the cargo can be shewn to have suffered in the voyage from Bristol to Maldonado, the assured have an undoubted right to recover; but upon the evidence as it now stands, I do not see that it is possible for the jury to determine whether the goods did sustain any, and if any, what damage, while they were protected by this policy.

*The Attorney General* answered, that the best evidence had been given which the nature of the case admitted; and the jury must estimate the damages according to the rules of probability. A jury was sometimes called upon to form a certain conclusion upon more uncertain premises; as in the well known case of a father and son, who were hanged together

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TUNNO.

together on the same gibbet, where it became necessary to decide which of them was the survivor. Here the jury must ascribe the damage to the different parts of the voyage, according to the best of their judgment. The plaintiff had effected another policy on the goods from the river Plate to the ship's port of discharge in the West Indies: but the second set of underwriters might equally well say, that it was uncertain whether any and what portion of the damage was sustained between Maldonado and Trinidad.

**Lord ELLENBOROUGH.** *Prima facie* the damage is referable to the second policy, unless the underwriters can shew that it happened before their liability attached. Most likely a part of it was occasioned by the tempestuous weather the ship experienced in sailing to the river Plate; but there is no proof of this, and no evidence is adduced that the jury can safely proceed upon. The burthen lies upon the plaintiff to shew specifically, that the goods insured were damaged by a peril against which the defendant is bound to indemnify him.

Plaintiff nonsuited.

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In the ensuing term, the *Attorney General* moved to set aside the nonsuit on both the grounds taken at the trial: but the other Judges concurred in opinion with the CHIEF JUSTICE, that the risk ended at Maldonado, and that as the state of the cargo had never been examined till the ship reached Trinidad, there was no sufficient evidence for the jury

jury to presume that any part of the damage had happened while the policy remained in force.—  
*Rule nisi refused.*

1809.

PARKIN

v.

TUNNO..

*The Attorney General, Park, and Taddy, for the plaintiff.*

*Garrow, Scarlett, and F. Pollock, for the defendant.*

[Attorneys, Palmer and Blunt.]

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. *Vide Blackenhagen v. the London Assurance Co. ante, vol. 1. p. 454, and the cases there referred to.*

*KIST and others v. ATKINSON and others.*

Friday,  
March 10.

THIS was an action for commission alleged to be due to the plaintiffs in respect of a cargo of wheat they had shipped for the defendants from Konigsberg to London.

It is agreed between A. and B. that A. for certain commission shall ship a cargo of wheat, of a specific quality, at a foreign port for B. in England. The wheat shipped by A. being found upon its arrival to be of an inferior quality,

When the wheat in question arrived, the defendants insisted it was of a much inferior quality to that which they had ordered. They therefore sold it under protest on account of the plaintiffs, and

B. brings an action against A. for a breach of the agreement, and recovers damages — Held, that A. cannot afterwards maintain an action against B. for the commission, as his claim for this might have been given in evidence in the former action to reduce the damages.

afterwards

1809. afterwards brought an action against them for  
 Kist  
 v.  
**ATKINSON.** breach of contract, in which they recovered  
 399*l.* 9*s.*

*Garrow* contended, that the plaintiffs had now a clear right to their commission, according to the terms of the contract. For any damage which the defendants had sustained by the bad quality of the wheat, they had received a full compensation. Therefore things stood between the parties exactly as if the wheat had been of the quality ordered, and the agreement had been in all respects fulfilled on the part of the plaintiffs.

Lord ELLENBOROUGH. The facts which the present plaintiffs now rely upon might have been given in evidence, to reduce the damages when they were defendants. I consider the account as closed between the parties by the former verdict.

Plaintiffs nonsuited.

*Garrow, Topping, and Parnther* for the plaintiffs.

*Park and Taddy* for the defendants.

[Attorneys, *Druce and Palmer & Co.*]

*Vide Baston v. Butter*, 7 East. 479. *Fisher v. Samuda*, *ante*, vol. 1. p. 190.

1809.

Friday,  
March 10,

## DE TASTET and others v. BARING and others.

THIS was an action by the indorsees against the indorsers of two bills of exchange, drawn in London by J. Hodgson upon Joze Luiz da Silva at Lisbon, each for the sum of 2220 mil. 767 reis, and falling due, the one the 30th of November, the other the 30th of December, 1807.

It was admitted, that the defendants were liable as indorsers of these bills, and that the plaintiffs as indorsees had been paid principal, interest, and all charges, *except re-exchange*. The question between the parties was, whether the plaintiffs were entitled to recover any and what re-exchange on both or either of the bills.

On the 7th of April 1807, a few days after purchasing these bills from the defendants, the plaintiffs indorsed them and remitted them to Messrs. Jeronimo Rebeiro, Neaves, & Co. at Lisbon, by whom they were presented for payment. Before either of them became due the French had taken possession of Lisbon, and the English were excluded from Portugal. However, Messrs. Jeronimo Rebeiro, Neaves, & Co. re-drew upon the plaintiffs in respect of the bills in question; one re-draft being dated 24th December 1807, and the other 30th January, 1808. Both were drawn at the Exchange

Bills of exchange upon Lisbon were indorsed by A. to B. in this country, and afterwards by B. to C. a merchant at Lisbon. When the bills became due, Lisbon was in the hands of the French, and they were dishonoured. C. re-drew upon B. in London, but B. did not honour the re-drafts. It did not appear clearly whether at that time there was an established course of exchange between Lisbon and London. In an action by B. against A. upon the bills, the plaintiffs' claim to re-exchange was disallowed by the jury, and the court afterwards refused to set aside the verdict upon that ground.

1809.

DE TASTER  
v.BARING.  
(a) Sum paid  
defendants for  
the bills  
1147 l. 8 s.  
Sum demanded,  
1271 l. 13 s. 4d.

of 68,—the bills having been negotiated in this country at 62,—thus making a difference of 6 d. per milrei (a). When the re-drafts arrived in London, they were dishonoured by the plaintiffs.

*Garrow* for the defendants contended, that Portugal being an enemy's country at the time when these bills became due, no British subject was liable for re-exchange upon them ; and that at any rate no claim for re-exchange could be set up by the present plaintiffs, as they had refused to pay any to their indorsees, and therefore were not damni-fied in this respect by the dishonour of the bills.

*The Attorney General* answered, that the plaintiffs, however they might have refused to accept the re-drafts, were clearly themselves liable for re-exchange to Messrs. Rebeiro, Neaves, & Co. By indorsing the bills, they had undertaken that this house on certain days should receive at Lisbon certain sums of Portuguese money, either from Da Silva, the acceptor of the bills, or failing him, from any person who would advance the money upon drafts on the plaintiffs at the current exchange of the day. Da Silva's property being seized by the French, he was unable to pay, and the holders of the bills had therefore an undoubted right to resort to the other alternative of the indorsers' obligation, and to raise the sums specified in the bills by re-drawing upon London, however disadvantageous the exchange might be. If the plaintiffs had refused to accept the re-drafts, they might

might be compelled to pay the amount of them by an action on the bills. Having thus incurred a liability for re-exchange by the dishonour of the bills, they had a right to come upon the defendants, who were their indorsers, and had contracted the same engagement with them which they themselves had with their indorsees at Lisbon. It would have been no answer with respect to the principal money, that that had not been paid by the plaintiffs. No more was it as to the re-exchange. In both cases a liability to pay when legally called upon, was sufficient.

1809.  
DE TASTET  
v.  
BARING.

*Lord ELLENBOROUGH* observed, that the question must depend upon the usage of merchants, and directed the jury to find for the plaintiffs, if they had either paid or become liable for re-exchange themselves.

A full special jury, after some deliberation, found a verdict for the defendants, which the court afterwards refused to set aside.

*The Attorney General* and *Littledale* for the plaintiffs.

*Garrow* and *Marryat* for the defendants.

[Attorneys, *Cooper & Lowe* and *Gregson & Dixon.* ]

*Vide Mellish v. Simeon, 2 H. Bl. 378. Pollard v. Herries, 3 B. & P. 335.*

1809.

Saturday,  
March 11,

## DUNCAN v. SKIPWITH.

*A* residing at *X*, employs *B*, residing at *Y*, to procure payment of a bill there, and to remit the produce direct to him at *X*.—*B*, receives payment of the bill, but remits the produce to a third person at *Z*, for *A*'s use, whereby the whole gets into the hands of *A*'s creditors. *A* cannot maintain an action for money had and received against *B*, to recover the amount of the sum received in payment of the bill.

*Tuddy* for the plaintiff stated, that the action was brought to recover a sum of money which the defendant had received in payment of a French *ordonnance* (a negotiable instrument in the nature of our navy bills), which had been drawn by General Le Clerc, at St. Domingo, on the minister of the marine at Paris, in favour of one Taylor, and had been assigned for a valuable consideration to the plaintiff, a merchant at Fredericksburgh in Virginia. The defendant then residing at Paris as a diplomatic agent of the American government, the plaintiff employed him to procure payment of this instrument, and desired that he would remit the money direct to him at Fredericksburgh. The *ordonnance* was duly honoured by the French government; but the defendant, instead of obeying his instructions, remitted the proceeds in bills, payable to the plaintiff's order, to Mr. Paterson, president of the bank at Baltimore. The consequence was, that the plaintiff's creditors had got possession of these bills, under a pretended authority derived from a deed of trust. But as the defendant had not remitted the money in the manner required, he must still be supposed to have it in his hands, as he had received it,—for the plaintiff's use.

Lord

**Lord Ellenborough.** Having no special count for misconduct, you fail *in limine*. Besides, the defendant had a lien upon the money received from the French government for his commission, and was not bound to part with it till that was satisfied. In short, you have no declaration to sustain your case; and you have no case to be sustained, if you had a declaration.

1809.  
DUNCAN  
v,  
SKIPWITH.

Plaintiff nonsuited.

. *Taddy* for the plaintiff.

*Garrow and Park* for the defendant.

[*Attorneys, Westons and Dance.*]

### MARSHALL v. PARKER.

Saturday,  
March 11.

THIS was an action on a policy of insurance on fish valued at 1150*l.* on board the Danish ship Cupido, from Mount's Bay to Leghorn.

*J. Warren* for the plaintiff, at first satisfied himself with proving, that a cargo of pilchards was put on board the Cupido in Mount's Bay, and putting in a minute of council, which directed a licence to be granted for this ship to carry a cargo of pilchards

she sailed upon the voyage insured.—Goods protected by a valued policy, being condemned as lawful prize, the captors paying the freight. The assured may nevertheless recover as for a total loss.

The sentence of condemnation of a foreign court of Admiralty cannot be received in evidence, without previous proof of the ship having been captured.—A licence is prima facie evidence, that when a ship left her port of outfit,

1809.  
MARSHALL v. PARKER. to Leghorn, and a sentence of the French Admiralty Court, whereby the cargo of the Cupido was adjudged good prize, the captors paying freight to the captain, to whom the vessel was ordered to be restored.

*Garrow* for the defendant objected, that there was no evidence of the ship having ever sailed on the voyage insured, and that the sentence was not by itself sufficient evidence of the capture.

Lord ELLENBOROUGH. From the licence, we may presume that the ship sailed for Leghorn (*a*) ; but certainly the plaintiff has not proved that she was captured on her way thither. You must lay a foundation for the sentence. At present it is merely *in vacuo*. Prove a capture, and I will receive the sentence as evidence of the facts on which the condemnation proceeded.

A witness was then called, who stated, that the ship was taken by a French privateer within a short distance of Leghorn ; that she was carried into that port, and that the cargo was there sold by Darby & Co. to whom it had been originally consigned.

*Garrow* contended, that as the cargo had reached its destination, the underwriters were discharged ; and that at any rate they could not be liable for the full sum of 1150*l.*, as the freight, which was

(*a*) *Vide Cohen v. Hinckley, ante, 51. Twemlow v. Oswin, post.*

included in the valuation, was to be paid, not by the assured, but by the captors.

1809.  
M A R S H A L L  
*v.*  
P A R K E R.

**Lord ELLENBOROUGH.** The cargo was intercepted on the voyage insured, and though carried into Leghorn, and sold by the consignees, this is the same as if it had been carried into any other hostile port, and disposed of in any other manner. It never reached the agents of the assured. The sale was for the benefit of the captors.—Nor, without evidence of fraud, can I disturb the valuation,

Verdict for sum insured.

*J. Warren* for the plaintiff.

*Garrow, Park, and Scarlett* for the defendant.

[Attorneys, *Wadeson and Rigby.*]

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*Vide Shawe v. Felton, 2 East. 109.*

## COURT OF COMMON PLEAS.

1809.

## SITTINGS AFTER TERM AT WESTMINSTER.

Saturday,  
Feb. 18.

## FINNERTY v. TIPPER.

In an action for  
a libel, the  
plaintiff cannot  
give in evi-  
dence other  
libels published  
concerning him  
by the defen-  
dant, unless  
they directly  
refer to the  
libel set out in  
the declaration.

THIS was an action for a libel published in a periodical work, called "The Satirist, or Mouthly Meteor," which stated (amongst other things), that the plaintiff being prosecuted by the Attorney General, had fled the country, that he might save himself from the pillory.

In addition to the libel set out in the declaration, the plaintiff's counsel proposed to read extracts from subsequent numbers of "The Satirist," to prove the malicious motive with which the former libel had been published.

Sir JAMES MANSFIELD, C.J. Unless the subsequent publications expressly refer to the libel for which the action is brought, they cannot be read. You might as well give in evidence one highway robbery on the trial of another.

*Best.*

*Best, Serjeant, Clifford, and Adolphus* contended, that the subsequent publications were admissible to shew, *quo animo* the defendant had published the libel declared upon. They were not offered as part of the present cause of action, or to aggravate the damages. If the plaintiff wished to recover a compensation for any injury he had sustained by them, he was certainly bound to bring a fresh action. But they might clearly be used to explain the defendant's act in publishing the original libel. For this purpose, in actions like the present, subsequent libels and subsequent words of defamation were constantly received in evidence. In a late case in *Campbell's Reports*, this point had been so ruled by Lord Ellenborough, in an action for words (*a*). So, in the case of Carr v. Hood, which was an action for a libel contained in the second edition of a book called "My Pocket Book," the first, second, and third editions of that book were received in evidence, and likewise a *number* of the Monthly Mirror, a work published by the same defendant, in which he continued to abuse the plaintiff, Sir John Carr. The same doctrine was recently held by the whole court of K. B. in the case of Tate v. Humphrey (*b*), from the Oxford Circuit.

1809.  
FINNEGAN  
v.  
TIPPER.

(*a*) *Rustell v. M'Quister*, 1 Campb. 49.

(*b*) *Tate v. Humphrey*, H. C. Lent Assizes, 1808. Cor. GRAHAM, B. Action for words of perjury. To shew the *quo animo*,

the plaintiff offered in evidence a bill of indictment which had been subsequently preferred by the defendant against him, and which the grand jury returned *ignoramus*. The defendant's counsel

1809.  
FINNERTY  
v.  
TIPPER.

Circuit. Even in criminal cases the same principle was recognized. Thus, in *The King v. Hart*, the editor of the Independent Whig, when the defendant came up for judgment, many papers were read which had been published subsequent to the libels set out in the information.

Sir JAMES MANSFIELD, C. J. I am still of the same opinion. If the doctrine contended for were to prevail, it might happen that the first libel might be almost nothing, while the second might contain the most shocking imputations ; and the necessary consequence would be, that the jury would give damages for the second libel in an action for the first. Besides, with respect to the second libel, of whatever crimes it accuses a man, it may be true ; and the defendant has no opportunity to prove the truth of it, unless it is made the subject of a distinct action. I do not say, that a subsequent publication may not so far refer to the subject of the declaration, as to permit it to be used in evidence ; as, for instance, suppose a man published a libel, and afterwards published a paper, saying, that every thing in the libel was true, that would not be a new, distinct, and substantive libel, but might

counsel objected, that this was the subject of an action for a malicious prosecution ; but GRAHAM, B. received it as evidence to prove the malicious intent with which the words were spoken.—The following

term an application was made to set aside the verdict for the plaintiff on this ground ; but the Judges were of opinion, that the evidence had been properly admitted, and a new trial was refused.

be

be read at the trial to prove the malice of the original publication. I do not think that any case can be authority, which goes farther. With the cases which have been actually cited, I am disposed to agree. I know that in actions for words it has been allowed to give evidence of words subsequently spoken; but I believe that has been restrained to words relating to the same subject. In an action for words of perjury, I do not believe that any judge has received in evidence words subsequently spoken by the defendant, accusing the plaintiff of murder. Upon consideration, I think the case before Mr. Baron Graham was rightly decided, inasmuch as the circumstance of preferring the indictment was there proved to shew the malice, and the indictment itself, in point of fact, merely repeated the words for which the action was brought. But had it been an indictment for a highway robbery, I should have thought very differently.—With regard to *Sir John Carr's case*, it has not the least relation to the one before me. That was an action by an author for a severe animadversion on some of his writings. The defence was, that this was written in the fair spirit of criticism, and that it was not published with a malicious intention to defame *Sir John Carr*. Therefore, the manner in which the work itself was sold, and any other papers published by the defendant, to shew that he was actuated by malice in publishing the libel complained of, were certainly admissible evidence.—I have looked at the passages now proposed to be read, and it would be the most monstrous injustice to the defendant to receive the whole of them

1809.  
FINNERTY  
v.  
TIPPER.

1809.

them in evidence. You may read the sentence if you will. Farther you must not go.

FINNERTYT.  
TIPPER.

The following sentence was read accordingly, from a Number of "The Satirist" published after the action was brought:—"We certainly did state in our last number, that we understood Peter Finnerty had quitted the country, and we had good grounds for believing that he had; but it now appears, that he merely spread a report of his absence, and remained concealed in London (a)."

It is not a bar  
to an action for  
a libel, that the  
plaintiff has  
been in the  
habit of libel-  
ling the defen-  
dant.

*Shepherd*, Serjeant, for the defendant, proposed to prove, by way of complete answer to the action, that the plaintiff had proposed, as a question for discussion in a public debating society, of which he was manager, "Whether the editor of the Satirist, or a notorious pickpocket, was the greater nuisance to society;" that he had caused boards, with the question printed upon them in large characters, to be carried through the streets; and that when the question came on, he took an active part in the debate, giving the decided preference to the pickpocket. These facts, it was contended, on the authority of *Anthony Pasquin's case*, before Lord Kenyon, would entitle the defendant to a verdict.

(a) *Vide Mead v. Daubigny*, Peak. Cas. 125. *Lee v. Huson*, ib. 166. *Rex v. Ball*, 1 Campb. 324.

Sir

Sir JAMES MANSFIELD. I cannot go so far as Lord Kenyon is stated to have done. The decision of that case, I rather think, was incorrect in point of form, though it was correct in point of justice. If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself, and he cannot be supposed to suffer much injury from this source. But I cannot say that he suffers none, or that he loses his right to maintain any such action. The evidence opened does not amount to an absolute defence in law, but will be most essential with respect to the damages. If two men are concerned in publishing monstrous libels against each other every day, there can be no claim to damages on either side.

Verdict for the plaintiff.—Damages 1*s.*

*Best, Serjeant, Clifford, and Adolphus*, for the plaintiff.

*Shepherd, Vaughan, and Manley*, Serjeants, for the defendants.

So in the case of *Crim. Con.* Lord Kenyon held, that the notorious, undisguised infidelity of the husband, was a complete bar to the action. *Wyndham v.*

*Lord Wycombe*, 4 Esp. 16. But the better opinion seems now to be, that it only goes in mitigation of damages. *Bromley v. Wallace*, *ib.* 237.

1809.

FINNERTY  
v.  
TIPPER.

1809.

## ADJOURNED SITTINGS IN LONDON.

Wednesday,  
Feb. 22.

*Doe ex d. Pitcher v. Donovan.*

Premises are let from year to year, upon an agreement, that either party may determine the tenancy by a quarter's notice. This notice must expire at that period of the year when the tenancy commenced.

**EJECTMENT** for a house in Cock Court.

Pitcher had let this house to one Quelle, from year to year, upon an agreement *that either party might determine the tenancy by a quarter's notice.* Quelle entered at Michaelmas 1802, and occupied the premises for some time himself. He then underlet them to the defendant on the same terms on which he himself held them; and things continued on this footing for several years. But at Lady-day 1808, Quelle gave a written notice to Pitcher that he should deliver up possession of the premises to him at Midsummer following, and a similar notice to the defendant, to quit the premises at the same period. The question was, Whether this was a sufficient notice to determine the tenancy within the meaning of the agreement?

*Manley*, Serjeant, for the defendant, contended, that the tenancy had not been properly determined, as the quarter's notice ought to expire at that season of the year when the tenancy commenced; and cited, as in point, *Right ex d. Flower v. Darby*, 1 T. R. 159.

*Best,*

*Best*, Serjeant, *contra*, insisted, that although in the common case of a tenancy from year to year, there must be half a year's notice to quit, expiring at that season of the year when the tenancy commenced; yet where it was expressly agreed between the parties, that a quarter's notice should be sufficient, their meaning must be taken to be, that the notice might expire at any of the four quarter-days when the rent was payable.

1809.  
Doe,  
v.  
DONOVAN.

Sir JAMES MANSFIELD, C. J. saved the point; and the Court of C. P. being of opinion that the notice was insufficient, ordered a nonsuit to be entered.

*Best*, Serjeant, and *Hemming*, for the lessor of the plaintiff.

*Manley*, Serjeant, for the defendant.

[*Attorneys*, *Dodd* and *Ledwick*.]

### CHRISTIE v. GRIGGS.

Thu sday,  
Feb. 23.

THIS was an action of assumpsit against the defendant as owner of the *Blackwall Stage*, on which the plaintiff, a pilot, was travelling to

coach broke down, and the plaintiff, travelling by it as a passenger, was hurt; to prove it is *prima facie* enough to give evidence of the coach having broke down;—from negligence will be inferred.—The proprietor of a stage coach is not answerable for any may happen to a passenger, from the coach being overturned by a mere accident.

London,

1809.

CHRISTIE  
v.  
GRIGGS.

London, when it broke down, and he was greatly bruised. The first count imputed the accident to the negligence of the driver; the second, to the insufficiency of the carriage.

The plaintiff having proved that the axle-tree snapped asunder at a place where there is a slight descent, from the kennel crossing the road; that he was, in consequence, precipitated from the top of the coach; and that the bruises he received confined him several weeks to his bed--there rested his case.

*Best*, Serjeant, contended strenuously that the plaintiff was bound to proceed farther, and give evidence, either of the driver being unskilful, or of the coach being insufficient.

Sir JAMES MANSFIELD, C. J. I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to shew, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could any where be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it

it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers *a mere accident*.

1809.  
CHRISTIE  
v.  
GRIECE.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that when the accident happened, the coachman, a very skilful driver, was driving in the usual track, and at a moderate pace.

Sir JAMES MANSFIELD said, as the driver had been cleared of every thing like negligence, the question for the jury would be---as to the sufficiency of the coach. If the axle-tree was sound as far as human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no farther than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.

The jury found a verdict for the defendant.

*Vaughan, Serjeant, and Roberts*, for the plaintiff.

*Best, Serjeant*, for the defendant.

[Attorneys, *Brown and Sabine*.]

*Vide Aston v. Heaven, 2 Esp. Cas. 533.*

1809.

Friday,  
Feb. 24.

In an action on  
the warranty of  
a horse, the  
plaintiff is not  
entitled to re-  
cover for the  
expence of  
keeping the  
horse, unless on  
discovering the  
unsoundness,  
he offered to  
return him to  
the defendant.

## CASWELL v. COARE.

**D**ECLARATION on the warranty of a horse,  
with counts for horsemeat, &c.

The unsoundness of the horse was clearly proved; and the chief question was, Whether the plaintiff was entitled to recover for his *keep* from the time when the unsoundness was discovered. He was then sent to a livery stable, and no offer had been made to return him to the defendant.

*Best*, Serjeant, contended, that the plaintiff had a right to recover for the keep as part of the damage he suffered from the breach of the warranty.

Sir JAMES MANSFIELD, C.J. I am of opinion that he has not. I remember when it was held, that an action could not be maintained upon the warranty, without an offer to return the horse. That doctrine is now exploded (*a*); but still, unless the defendant refuses to take back the horse, the plaintiff cannot complain that the expence of the keep is necessarily thrown upon him. By not offering to return the horse before bringing the action, he intimates that he still considers the animal as his own, and he therefore ought to maintain him at his own expence.

Verdict for the plaintiff.

*Best*, Serjeant, and *Reader*, for the plaintiff.

*Cockell*, Serjeant, and *Littledale*, for the defendant.

(*a*) *Fielder v. Starkin*, 1 H. Bl. 17.

*Vide Curtis v. Hannay*, 3 Esp. Cas. 82.

1809.

LIVESAY v. HOOD and others, assignees of  
ALMOND, a bankrupt.

Monday,  
Feb. 27.

### TROVER for divers quantities of hosiery.

By an agreement between the plaintiff, a wholesale hosier, and Almond, a retail hosier, the former was to supply the latter with goods *upon sale or return*. Almond was constantly to have a stock of hosiery from the plaintiff to the value of 100*l.* which he was to sell in his shop. The parties were to settle monthly; and Almond was to pay the plaintiff for the articles sold, at the invoice price, deducting 5*l.* per cent. Goods were accordingly furnished under this agreement, and the bill of parcels which accompanied them was entitled “*J. Almond from Livesay & Co.*” At the end of a month the account was settled; and Almond having paid the plaintiff for the articles which had been sold, according to the agreement, the stock was again made up to 100*l.* About the end of the second month, Almond became bankrupt, and the defendants were chosen his assignees. There were then in his shop goods supplied under the agreement to the amount of 61*l.* which the defendants seized as part of the bankrupt’s effects, and refused to deliver up when demanded by the plaintiff.

*Best*, Serjeant, contended, that these goods vested in the assignees under 21 Jac. 1. c. 19. s. 11, as they

Goods in the  
hands of a retail  
dealer upon sale  
or return, pass  
under a com-  
mission of  
bankrupt  
against him, by  
21 Jac. 1. c. 19.

1809.  
LIVESAY  
*v.*  
HORN.

had been in the possession, order, and disposition of the bankrupt at the time of his bankruptcy, with the permission and consent of the true owner.

*Shepherd, Serjeant, contra*, insisted, that Almond had possession of the goods only as a factor for the plaintiff; and that the case of a factor had always been considered as excluded from the provisions of this statute (*a*).

LAWRENCE, J. I think this is a case within the statute of *James*. Under the agreement, the bankrupt was to sell these goods, not as a factor, but as a principal. They appeared to the world as his property; and this reputed ownership was calculated to gain him a delusive credit, which it was the object of the statute to prevent.

Plaintiff nonsuited. . . .

*Shepherd, Serjeant, and Marryat* for the plaintiff.

*Best and Vaughan, Serjeants*, for the defendant.

[Attorneys, *Bell and Swain.*] —

(*a*) *Godfrey v. Fuzo*, 3 P. Wms. 185. *Mace v. Cadell*, Cwmp. 233.

1809.

## TWEMLOW and others v. OSWIN.

Wednesday,  
March 1.

THIS was an action on a policy of insurance on the ship commerce, at and from Liverpool to Miremachi, in the Gulf of St. Lawrence, and from thence to Hayti. The loss was laid in one count to be by capture; in another, by the perils of the seas; and in both, to have happened before the ship reached Miremachi.

The ship sailed from Liverpool on the 14th of April 1807. On the 23d of July following, the plaintiff's, who reside at Liverpool, received a letter from their correspondent at Miremachi, dated June 14, stating that the ship had not then arrived, but was expected in a few days. The policy was effected on the 4th of August, when this letter was shewn to the underwriters. In addition to these facts, the plaintiff's proved, that they were the owners of the ship; and called one of their clerks, who swore she had not been heard of since.

*Shepherd, Serjeant*, contended, that the plaintiffs must be nonsuited unless they gave some further evidence of the loss of the ship. Although she had not been heard of at Liverpool, she might have arrived at Miremachi. In all these cases, it was usual to bring witnesses from the outward port; and although this might be dispensed with where the voyage insured was out and home, it was

G 3

peculiarly

In an action on a policy from an English to a foreign port, to found a presumption that the ship was lost on the voyage, it is enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to shew, that she never arrived there.

1809. peculiarly necessary here, where, for any thing that appeared, it was not the intention of this ship ever to return to Europe. The plaintiffs had not offered the best evidence which the nature of the case admitted of, and they had not laid the proper groundwork for the presumption that the ship had perished.

Sir JAMES MANSFIELD, C. J. held, that this was evidence to go to the jury of a loss, as laid in the declaration ; and the plaintiffs had a verdict.

*Vaughan, Pell, Serjeants, and Barrow*, for the plaintiffs.

*Shepherd and Best, Serjeants*, for the defendant.

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*Vide Cohen v. Hinckley, ante, 51.*

## HOME CIRCUIT.

LENT ASSIZES, 49 GEORGE III.

### HORSHAM.

CORAM M'DONALD, C. B.

1809.

SALTER v. TURNER Clerk,

Monday,  
March 20.

THIS was an action for a libel upon the plaintiff in the management of a public charity.

The declaration stated, that Sir Edward Law, Knt. his Majesty's attorney general, filed an information in the court of Chancery against one Thomas *Eamy*; and "that afterwards, and before the publishing, &c. to wit, on &c., the answer of the said Thomas *Eamy* to the said information was filed in his Majesty's said court of Chancery."

To support an allegation, that to an information in chancery against T. *Eamy*, "the answer of the said T. *Eamy* was filed," it is enough to put in an office copy of an answer to the information, entitled "the answer of T. *Eamy*," although this be signed T. *Eamy*.

In support of the last allegation there was produced an office copy of an answer to the information, entitled, "The several answer of Thomas *Eamy*," but signed "Thomas *Eamy*."

*Shepherd*, Serjeant, contended, that the allegation was not proved, as there was no evidence that

G 1

Thomas

1809.


  
**SALTER**  
*v.*  
**TURNER.**

Thomas *Eamy* and Thomas *Amey* were the same person. If the original answer had been produced, and the hand-writing proved to be that of a person known by the name of *Eamy*, it might have been enough; but there was no ground laid for the presumption, that the person who signed the answer was the person against whom the information had been filed. It stood as if the two names had been totally dissimilar; in which case no one could have argued, that this must be taken to be the answer of Thomas *Eamy*. The declaration would have done enough in stating, that an answer "*entitled* the several answer of Thomas *Eamy*" was filed; but the averment actually introduced, rendered evidence indispensable of this being "*the answer of the said Thomas Eamy*."

*Garraw* answered, that the signature was immaterial, and that if this person had made his *mark* to the answer, it nevertheless would have been the answer, not of *A*, but of *Thomas Eamy*.

*M'DONALD, C. B.* The person who signs his name *Thomas Amey*, by answering the bill, allows that he is the person against whom it is filed; and this is further proved by the jurat. I therefore think that the office copy is sufficient, without the production of the original answer and proof of the hand-writing.

The plaintiff had a verdict.

*Garraw* and *Harryat* for the plaintiff.

*Shepherd*, Serjeant, for the defendant.

1809.

## REX v. CRUNDEN. •

Tuesday,  
March 21.

**T**HIS was an indictment against the defendant for indecently exposing his naked person in the presence of divers of his Majesty's liege subjects, at Brighton, in the county of Sussex.

. It appeared, that on a Sunday forenoon, in July last, he bathed in the sea opposite the East Cliff at Brighton, undressing and dressing himself upon the beach. Till within a very few years there were no houses near this spot, and whole regiments of soldiers used to bathe there at the same time. There is now a row of houses erected on the cliff, from the windows of which the defendant might be distinctly seen as he undressed and swam in the sea. There was no evidence of his having been guilty of any wanton indecency, or having exposed his person beyond what was necessary for the purpose of bathing.

It is an indictable offence for a man to un-  
dress himself  
on the beach  
and to bathe in  
the sea, near in-  
habited houses,  
from which he  
may be dis-  
tinctly seen;  
although these  
houses may  
have been re-  
cently erected,  
and till then it  
may have been  
used for men  
to bathe in  
great numbers  
at the place in  
question.

*Marryat*, as his counsel, contended, that however censurable he might be, for a breach of delicacy and good manners, he had not been guilty of an indictable offence. His object was to procure health, and enjoy a favourite recreation, not to outrage decency or corrupt the public morals. He had no criminal intention, without which there can be no crime. Besides, it appeared that the practice of bathing

.1809.  
REX v.  
CRUSDEN.

bathing at this place had continued for many years; and if it was a nuisance, the inhabitants of the newly-erected houses *had come to the nuisance*, and had no right to complain of it. If the building of a house within sight of a spot appropriated to open bathing, rendered it a misdemeanor to bathe there any longer without a machine, the poor might soon be prevented from bathing on any part of the southern coast of the island. According to the principal contended for, all bathing must likewise be put a stop to in the Thames, and every other navigable river; for they are all public highways on which his Majesty's liege subjects are constantly passing and repassing; and Millbank, at which the Westminster boys have time immemorial been accustomed to bathe; is fully as much exposed to public view as the East Cliff at Brighton.

M'DONALD, C. B. I can entertain no doubt that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For any thing that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague house; but it will scarcely be said by the learned counsel for the defendant, that any one might now do so with impunity in Russell Square. Whatever  
place

place becomes the habitation of civilized men, there the laws of decency must be enforced.

1809.

REX

T.

CRUNDEN.

The defendant was found guilty; and when he was brought up for judgment, the Court of K. B. expressed a clear opinion, that the offence imputed to him was a misdemeanour, and that he had been properly convicted. However, as this was the first prosecution of the sort in modern times, they consented to his being discharged, upon his entering into a recognizance to appear when called for to receive sentence.

*Shepherd, Serjeant, and Gurney* for the prosecution.

*Marryatt* for the defendant.

The only case resembling this to be found in the books is *Rex v. Sir Charles Sedley*, M. T. 15 Car. 2. Sid. 168. 1 Keb. 620, S. C. The defendant being indicted for shewing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment, and was sentenced to pay a fine

of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.--It seems an established principle, that whatever openly outrages decency, and is injurious to public morals, is a misdemeanour at common law. 4 Bl. Com. 65. 1 Hawk. P.C. c. 5. s. 4. 1 East P. C. c. 1. s. 1.

1809.  


## KINGSTON.

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CORAM HEATH, J.

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Thursday,  
March 25.

## HART v. HORN.

In replevin, the declarations of the person under whom the defendant makes cognizance, are not evidence for the plaintiff.

**R**EPLEVIN. Cognizance, as bailiff to one *Massey*, for rent in arrear. Plea in bar, *non tenuit*.

The plaintiff's counsel, to disprove the tenancy, wished to give in evidence a declaration of *Massey*, the supposed landlord. They contended, that although not a party on the record, he was in reality the defendant in the action, and that the court would not force the plaintiff to call a witness who had such a direct interest to suppress the truth. In fact, what *Massey* had said voluntarily before action brought, must be considered better evidence than what he would now swear to with such a bias on his mind.

*Garrow* urged that *Massey* was clearly a good witness for the plaintiff, and that he must therefore be called.

HEATH,

HEATH, J. was of opinion, that what *Massey* said was not evidence against the defendant.

1809.

HART

v.

HORN.

The plaintiff had a verdict.

*Shepherd and Best, Serjeants, and H. Shepherd* for the plaintiff.

*Garrow* for the defendant.

[Attorneys, *Isacks and Spike*.]

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But a rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper; and since he cannot be compelled to be a witness, his declarations are evidence for the adverse parish. *Rex v. Woburn*, 10 East 395. Great confusion, however, would be introduced into proceedings at law, if it were to be inferred

as a corollary from this decision, that where an action is brought by or against a trustee, the declarations of the *cestui que trust* shall be evidence for the opposite party.—The declarations of the trustee being admissible, it seems to follow that the *cestui que trust* must be called as a witness. *Bauerman v. Radenius*, 7 T.R. 663.

1809.

Thursday,  
March 23.

### WETHERSTON v. EDGINGTON.

Where an agreement not under seal is produced at the trial by one of the parties in pursuance of an undertaking to produce it, the opposite party, to make it evidence, must prove it in the same manner as if it had come from his own custody.

THE pleadings in this case were similar to those in the last.

The *holding* was to be proved by an agreement not under seal, which the plaintiff's attorney had undertaken to produce, and did produce accordingly.

*Best*, for the defendant contended, that under these circumstances the agreement did not require to be proved. He allowed that according to a late decision (*a*) it would have been otherwise, had this been a deed; but observed that a distinction had been taken by Sir JAMES MANSFIELD, between a deed and an instrument not under seal.

HEATH, J. The old rule was the sensible one, that an instrument coming from the opposite side was *prima facie* taken to be duly executed (*b*); but I can discover no difference as to this purpose between a deed and an agreement not under seal. You must prove this agreement as if it had been in your own custody.

(*a*) *Gordon v. Secretan*, 8 East 548.      (*b*) *Rex v. Middlezoy*, 2 T.R. 41.

The agreement was afterwards proyed by the attesting witness, and the defendant had a verdict.

1809.

WETHER-  
STON  
v.  
EDGINC-  
TON.

*Garrow* and *Lawes* for the plaintiff.

*Best*, Serjeant, and *Espinasse* for the defendant.

[Attornies, *Orchard and Broad*.]

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Q. Might not the chief objection to the rule now established upon this subject, that the party who calls for the instrument from the opposite side is ignorant of the name of the attesting witness, and therefore

cannot come prepared to prove it, be completely obviated by obtaining a rule of court or a judge's order to inspect the instrument before the trial? Vide *Cobke v. Stpecks*, M. 36 G. 3, cited 1 Tid. Prac, 431. 4th ed.

1809.

## MAIDSTONE.

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CORAM M'DONALD, C. B.

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Wednesday,  
March 29.ROE ex d. DEAN AND CHAPTER OF ROCHESTER  
v. PIERCE.

In an ejectment by a corporation against a tenant for a year to ye. a notice to quit given by a person acting as steward of the corporation is sufficient, tho' without evidence that he had an authority under seal from the corporation for this purpose.

**T**HIS was an ejectment to recover possession of the same cottage for the use and occupation of which the action was brought in *Dean and Chapter of Rochester v. Pierce*, ante Vol. I. 466.

It appeared that the defendant had occupied the cottage in question a great many years without any lease, and that Mr. Tuppeny, steward to the Dean and Chapter, in the time of Dr. Goodenough, predecessor to the present Dean, gave him verbal notice to quit, which expired some time before the day of the demise.

*Laws* for the defendant, objected to the regularity of the notice to quit, for which there appeared to be no sufficient authority. The landlords being a corporation,

a corporation, it was requisite either to prove a notice to quit under the corporation seal, or to shew that *Mr. Twopenny*, who gave the notice, had a power of attorney under the same seal for so

1809.  
ROE  
v.  
PIERCE.

**M'DONALD, C. B.** A verbal notice to quit given by the steward of the Dean and Chapter, is sufficient, without any other evidence of his authority. The Dean and Chapter by bringing the ejectment shew, that they authorized, and that they adopt, his act.

The lessors of the plaintiff obtained a verdict.

*Best, Sejeant, and Marryat*, for the lessors of the plaintiff.

*Laws* for the defendant.

[*Attorneys, Twopenny and Locke, &c.*]

**BARTON v. HANSON and others.**

Thursday,  
March 30.

**A**CTION for goods sold and delivered. Plea, the general issue.

The defendants are proprietors of a stage-coach which has run for some years between London and

that they shall each work the coach a stage with horses, their separate property, and maintained respectively at their separate expence.—B. and C. are jointly liable as co-partners with A. for the price of hay furnished at A.'s request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him under the agreement.

There is an  
agreement be-  
tween A., B.  
and C., the  
proprietors of a  
stage coach,  
who divide the  
general profits  
of the concern;

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**II**

**Hastings.**

1809.  
BARTON  
HANSON.

Hastings. The horses which worked the stage between Hurst Green and Tunbridge were put up in a stable at Lamberhurst. At this stable, to a man who took charge of the coach horses, the plaintiff, at the request of the defendant *Hanson*, delivered a quantity of hay and straw, which was used by these horses, and for the price of which the present action was brought. It appeared that *Hanson* had lately become insolvent.

The defence rested upon the following facts,---that although the defendants were joint proprietors of this stage coach, and shared the general profits of the concern; yet that each of them worked the coach a stage with horses which were his separate property, and which he was bound to maintain at his own separate expence; that the horses which occupied this stable, and drew the coach between Hurst Green and Tunbridge, were the sole property of *Hanson*; and that as he alone had ordered the hay and straw of the plaintiff, so the plaintiff had applied to him for payment, and had said that if he did not pay him, he must lose his money.---It was thence argued that the maintaining of these horses did not come within the scope of the partnership; that the credit was given singly to *Hanson*, and that the other defendants were not liable.

M'DONALD, C. B. This defence has as little foundation in law as in common honesty. The defendants are partners; and by what any one of them does respecting the partnership concerns, all the rest are bound. All the defendants enjoyed the benefit of the articles furnished by the plaintiff, and

and all are liable for the value of them. It is possible that a separate credit may be given to one of several partners; but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence. There is no such evidence in this case. If I deal with two partners, one of whom resides in London and the other in Cumberland, I apply for payment of my debt in the first instance, to the one who is at hand; but I do not thereby renounce my claim upon the other at a distance. The plaintiff demanded payment of Hanson; but, did he say to the rest of the defendants, "I will never look to you, for I gave you no credit?" This is a common action for goods sold to a partnership.

1809.  
BARTON  
v.  
HANSON.

Verdict for the plaintiff.

*Marryat and Lawes* for the plaintiff.

*Best, Serjeant, Gurney and D'Oyley*, for the defendant.

[Attorneys, *Pope and Martin*.]

If one of several partners promise individually to pay a debt, he will not be allowed to shew that it was due jointly from himself and his co-partners.

*Murray v. Somerville. Sittings after H. T. 1809.*—Money had and received. Plea in abatement, that the promise was made jointly with one Stuart and one Montgomery, who are both alive. Defendant proved that he had two partners of these names in America; but several letters

from him to the plaintiff were put in, which were signed in his own name, and in which he promised to pay the money in question, without making any mention of his partners. Lord ELLENBOROUGH held the letters conclusive evidence that the debt was due from the defendant individually, and not from the partnership; and the plaintiff had a verdict for the amount of his demand.

*Vide Dry v. Boswell*; ante Vol. I. p. 329.

1809.

Friday,  
March 31.

## REX v. MARTIN.

An Act of Parliament for regulating the concerns of the poor in a particular parish, requires that certain notice shall be given of a vestry for the election of a treasurer, and that a treasurer shall be elected at a vestry held in pursuance of such notice. To support an allegation in an indictment that "A. was duly elected treasurer of the said parish," an entry in the vestry book, stating that A. was elected treasurer at a vestry duly held in pursuance of notice, is sufficient evidence.

THIS was an indictment against the defendant, a silversmith at Greenwich, for a libel on one Richard Best in his office of treasurer of that parish.

The indictment averred, that the said Richard Best was duly appointed treasurer of the said parish.

--The management of the concerns of the poor in Greenwich is regulated by a local act of parliament, which provides that notice shall be given in a certain manner therein specified, of a vestry to be held on a certain day for the election of a treasurer, and that a treasurer shall be annually elected at a vestry so held in pursuance of such notice.

To prove the appointment of Mr. Best, there was offered in evidence an entry in the vestry book, in which it is stated, that at *a vestry duly held in pursuance of notice*, this gentleman was appointed treasurer of the parish for the year ensuing.

Best, Scrjeant, for the defendant, contended, that although it might have been enough if the indictment had stated that the prosecutor acted as treasurer when the supposed libel was published, it was essentially necessary to prove the allegation that he was *duly appointed*. But his appointment would be a nullity, unless the notice required by the act of

of parliament was given of the holding of the vestry at which he was elected. Evidence of that notice must therefore be given, or it did not appear whether he rightfully executed the office, or whether he had usurped it.

1809.  
Rex  
v.  
Martin.

M'DONALD, C. B. Strict evidence of the appointment does seem requisite, and to the validity of the appointment due notice of holding the vestry is essential. But, I conceive that this is fully proved by the recital in the vestry book. What is thus recorded before the inhabitants of the parish, I must consider as having their assent, and as being evidence in any case of this description. The books of the Bank of England, and of other public companies, are evidence to a great variety of purposes (a). I think the allegation is sufficiently substantiated.

The defendant was found guilty.

*Garrow, Marryat and Gurney* for the prosecution.

*Best, Serjeant, Alley and Bolland*, for the defendant.

[Attorneys, *Martyr and Parrell*.]

(a) *Bretton v. Cope*, Peak. Cas. 30.

So *corporation books*, concerning the public government of a city or town, when they have been publicly kept, and the entries have been made by a proper officer, are received as evidence of the facts contained in them. *Rex v. Mothersfall*, 1 Stra. 93. *Case of Thetford*, 12 Vιn. Abr. 90. pl. 16.



# CASES

ARGUED AND DECIDED AT

## N I S I   P R I U S IN K.B.

*At the Sittings in and after Easter Term,  
49 GEORGE III.*

SECOND SITTINGS IN TERM AT WESTMINSTER.

1809.

### MOLLETT v. BRAYNE.

A SSUMPSIT for use and occupation. Plea, tender as to part, and non assumpsit as to the residue.

It appeared that the defendant took the premises in question of the plaintiff, at Lady-day, 1808, at the yearly rent of £. 42. In the November following, disputes arose between the parties as to the doing of some repairs. The defendant then threatening to quit the premises, the plaintiff said, " You may quit when you please." The defendant accordingly left the premises a few days after, and tendered the plaintiff rent for a day beyond the time he had occupied them. This sum was paid into court upon the tender pleaded; and the

A tenancy from year to year created by parole, is not determined by a parole licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly.

1809. question now was, whether the plaintiff was entitled to rent after the defendant had quitted.  
MOLLETT

v.  
BRAYNE. Lord ELLENBOROUGH was of opinion that the tenancy was not determined merely by the landlord giving the tenant a parol licence to quit, and the tenant quitting accordingly. At that time there was a subsisting term in the premises, and the *statute of frauds* (29 Car. 2. c. 3. § 3.) provides, that no lease or term of years, or any uncertain interest of or in any messuages, lands, tenements, or hereditaments, shall be surrendered, unless by deed or note in writing, or by act and operation of law. Here, there was no deed or note in writing, and nothing was proved which can be considered a surrender by operation of law.

The plaintiff had a verdict for the rent down to Lady-day 1809; and the court of K. B. upon a motion for a new trial approved of the direction at Nisi Prius, and refused a rule to shew cause.

*Park and ----- for the plaintiff.*

*Garrow and F. Pollock for the defendant.*

So the mere cancelling of a lease is not a surrender of the term thereby granted, within the statute of frauds. *Roe v. Abp. of York*, 6 East, 86. Nor can a term from year to year created by parol, be assigned except by deed, or note in writing, or by operation of law. *Botting v. Martin, ante, Vol. 1.* p. 318.

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LAST Sittings in Term at Guildhall.

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1809.

CORAM BAYLEY, J.

TAYLOR v. JONES.

Saturday,  
May 13.

**A**CTION against the defendant, as indorser of a promissory note, due May 5th, 1805.

The plaintiff proved the defendant's indorsement, and also that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of the note to the maker, or of any notice of its nonpayment being given to the defendant; nor did it appear, that when the defendant so promised to pay, he knew whether any application for payment had been made to the maker.

In an action against the indorser of a promissory note or bill of exchange, it is sufficient evidence of presentment for payment and notice of dishonour, that the defendant promised absolutely to pay the note or bill after it was due,

*Gaselee* for the defendant contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder. In the cases hitherto decided upon this subject, something appeared that might be considered a waiver of any irregularity

1809.  
TAYLOR  
v.  
JONES.

irregularity with regard to the bill or note (*a*); which could not be inferred from a mere promise to pay, made at a time when the party, without being aware of it, was discharged from his liability.—But

**BAYLEY**, J. held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due to the acceptor or maker, and to receive notice of its dishonour, promises to pay it,—this is presumptive evidence of the presentment and notice, and he is bound by the promise so made.

Verdict for the plaintiff.

**Paley** for the plaintiff.

**Gaselee** for the defendant..

[Attorneys, Birkitt and Egerton.]

(*a*) *Vide Lundie v. Robertson*, 7 East 231.

But if the drawer or indorser after being arrested, without acknowledging his liability, merely offers to give a bill, by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice. *Cumming v. French. Westminster Sittings after Hilary Term, 1809.* Action on a bill of ex-

change drawn by the defendant, payable to his own order, and indorsed by him to one Woodroff, and by Woodroff to the plaintiff.

The plaintiff was not prepared to shew directly, that notice had been given to the defendant of the dishonour of the bill, but undertook to give evidence, from which

which it must either be inferred, that he had received such notice, or that he was not entitled to it, or that he waived the irregularity.

The clerk to the plaintiff's attorney accordingly swore, that having called upon the defendant after his arrest in this action, he asked him, "what he had to propose by way of settlement?" and that the defendant then said, "*I am willing to give my bill at one or two months;*" but that this offer was rejected.

Lord ELLENBOROUGH. This offer is neither an acknowledg-

ment, nor a waiver, to obviate the necessity of expressly proving notice of the dishonour of the bill. He might have offered to give his acceptance at one or two months, although being entitled to notice of the dishonour of the former bill, he had received none, and although, upon this compromise being refused, he meant to rely upon the objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made.

Plaintiff nonsuited.

1809.

TAYLOR  
v.  
JONES.

1809.

FIRST Sittings AFTER TERM AT WESTMINSTER.Tuesday,  
May 16.COBDEN v. BOLTON.

A carrier places a board in his office, giving notice that he will not be answerable for jewels, however small their value, unless entered as such; but circulates hand-bills, stating generally, that he will not be answerable for any article above the value of 5*l.*, unless entered as such.—He is answerable for the loss of jewels not entered as such, if under the value of 5*l.*

THIS was an action against the defendant for the loss of a broach and a ring, value £.1.12., sent by the Chichester coach, of which he is proprietor.

It was clearly proved that the articles in question had been delivered, properly packed up, at the defendant's coach-office at Charing Cross, and that they had never reached the person to whom they were addressed at Chichester.

The defendant's liability, however, was denied on account of a notice written in large letters on a board (*a*) in his office, whereby it is stated (among other things), that he would not be answerable for plate or jewels, *however small the value*, unless entered and paid for as such. To meet this evidence it was proved, on the part of the plaintiff, that the defendant had circulated a great number of printed hand-bills, containing a list of the various coaches he runs to different parts of

(*a*) A question arose, how the contents of this board, which was inlaid in the wall, should be given in evidence. Lord Ellenborough held that an *examined copy* should be produced, with which the defendant was prepared.

England,

England, and concluding with a memorandum, "that he would not be answerable for any article above the value of £. 5, unless entered as such and paid for accordingly," without any specific notice being taken of plate or jewels. It was contended for the defendant, that the notice on the board, which must be seen and read by every one when articles are delivered at the office, and the contract must be supposed to be entered into between the parties, ought to be considered as containing the terms of that contract.--But

**Lord ELLENBOROUGH** said, the printed papers in circulation dispensed with any necessity to attend to the notice in the office. Why should a person read the board when previously informed by the hand-bill of the terms on which the defendant carried on his business? I have a right to presume, that what is circulated by his authority contains the whole of the limitations he intends to put on his common law responsibility as a carrier, and gives a full statement of the special contract into which he enters with his customers. The property here being under the value of £. 5, the *loss* is the only point for the jury.

**Verdict for the plaintiff. Damages £.1. 12.**

**Garrow and Lawes for the plaintiff.**

**Park for the defendant.**

[*Attornies, Sturton and Bouill.*]

*Vide Nicholson v. Willan, 5 East, 507. Clarke v. Gray, 6 East,*  
464.

1809.

COBDEN

BOLTON,

1809.

Tuesday,  
May 16.

## PHILIPSON, Gent. one, &amp;c. v. CHASE.

In an action on an attorney's bill, the plaintiff cannot give parol evidence of the contents of the bill delivered, without a notice to produce it; but a copy made at the same time with the bill delivered, is good evidence, without such notice.

ACTION on an attorney's bill. Plea, the general issue.

To prove that a copy of the bill had been delivered pursuant to 2 Geo. II. c. 23. the plaintiff's clerk was called, who swore that he had delivered to the defendant a bill signed by the plaintiff, containing an account of the business done. He was then proceeding to state the items of this bill from the plaintiff's book, when the defendant's counsel objected that no notice had been given to produce it.

*Topping* and *Espinasse* for the plaintiff, insisted, that this was unnecessary. In *Jory v. Orchard*, 2 Bos. & Pul: 39, the court of C. P. held, that it was unnecessary to give a notice to produce the written demand of a copy of a warrant pursuant to 24 Geo. 2. c. 44, before giving evidence of its contents; and the very point before the court was decided in *Anderson v. May*, 2 Bos. & Pul. 237, where it was held that a copy of an attorney's bill, the original of which has been delivered to the defendant, may be admitted in evidence without proof of notice to produce the original. This had always been considered like the case of a notice to quit, in which no notice to produce was ever required.

Lord

**Lord ELLENBOROUGH.** If there are two co-temporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered. So it must have been in the cases which have been cited ; and if a duplicate of the bill delivered is offered, I am ready to receive it. But I am quite clear that this evidence from the plaintiff's books is inadmissible, to prove that a bill was delivered according to the statute. I approve of the practice as to notices to quit; and I remember when the point was first ruled by Mr. Justice Wilson, who said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required *in infinitum*.

Plaintiff nonsuited.

*Topping and Espinasse* for the plaintiff.

*Garrow* for the defendant.

[*Attorneys, Phillipson and Williams.*]

1809.

PHILLIPSON  
v.  
CHASE.

1809.

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FIRST Sittings after Term in London.

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Wednesday,  
May 17.

**BURROUGH v. MARTIN.**

A witness, for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined, from time to time, even after they were written, and while the facts stated in them were fresh in his recollection.

**I**N an action on a charter party, a witness was called to give an account of the voyage, and the log-book was laid before him for the purpose of refreshing his memory. Being asked whether he had written it himself, he said, that he had not, but that from time to time he examined the entries in it while the events recorded were fresh in his recollection, and that he always found the entries accurate.

*The Attorney General* contended, that the witness could make no use of the log-book during his examination, notwithstanding his former inspection of it, and that the only case where a witness could refer to a written paper for the purpose of giving evidence, was where he had actually written it himself, and had thus the surest means of knowing the truth of its contents.

**Lord ELLENBOROUGH.** If the witness looked at the log-book from time to time, while the occurrences mentioned in it were recent and fresh in his recollection, it is as good as if he had written the whole with his own hand. This collation gave him an ample opportunity to ascertain the correctness of

of the entries, and he may therefore refer to these, on the same principle that witnesses are allowed to refresh their memory by reading letters and other documents which they themselves have written.

1809.  
BURROUGH  
v.  
MARTIN.

The witness was then asked, under his lordship's sanction, 1st. Whether he saw an entry of 23d June 1808, at a time when he had a memory of the fact stated in it? and 2dly, Whether, looking at the entry, he could now state positively, upon his oath, when the ship arrived at her port of destination?

*Garrow, Park, and Abbott* for the plaintiff.

*The Attorney General and Marryat* for the defendant.

[Attorneys, Rawlinson and Crowder & Co.]

*Vide Doe v. Perkins*, 3 T. R. 749. *Tanner v. Taylor*, ib. 754.  
*Jacob v. Lindsay*, 1 East 460.

### HOPEWELL v. DE PINNA.

Tuesday,  
May 16.

**A**CTION on promissory note, dated 28 July 1808. Under a plea of  
---Plea, coverture.

The defendant proved, that in the year 1779 she was married in London, according to the rites of the Jewish religion, to David Serfity de Pinna, and that this person went to Jamaica about 12 years ago; where it appeared that the defendant's husband went abroad 12 years ago; held, that she was bound to prove that he was alive within 7 years.

1809. ago. The question was, as to the degree of evidence required to prove that he was still alive.

HOPEWELL

v.

**DE PINNA.** It was insisted for the plaintiff, that in support of this plea, the defendant was bound to give strict evidence, that her husband was alive at the commencement of the action, or at least at the date of the note; while it was contended, on the part of the defendant, that the presumption was in favour of any person being still living who was shewn to have been in existence within such a period as twelve years, and that in many cases of this sort, where the husband was gone to a distant part of the world, it would be quite impossible to adduce direct and positive proof of his being alive, although the fact could not reasonably be doubted.

**Lord ELLENBOROUGH** ruled, that it lay upon the defendant to prove that her husband was alive within seven years.

Letters were afterwards produced, which he had written within that period from Jamaica to his friends in England, and the defendant had a verdict.

\* *Laws* for the plaintiff.

Reader for the defendant.

[Attorneys, *Turner and Irace.*]

FIRST Sittings AFTER TERM IN LONDON.

1809.

MESSING v. KEMBLE.

Wednesday,  
May 17.

**D**ECLARATION in trespass, in the common form, for breaking and entering the plaintiff's house, and seizing his goods.—Plea, not guilty.

It appeared that the plaintiff held the house mentioned in the declaration under the defendant, and that the goods in question were seized as a distress for rent in arrear, but that they were sold without having been previously appraised pursuant to the statute 2 W. & M. c. 5.<sup>1</sup>

*Marryat* for the plaintiff, contended that under these circumstances he was entitled to a verdict; for though it was enacted by 11 Geo. 2. c. 19. § 19. that a distress for rent justly due, should not by reason of any irregularity in the mode of conducting it, be deemed unlawful, nor the party making it a trespasser *ab initio*, yet it was provided that the party aggrieved by such irregularity, "may recover full satisfaction for the special damage he shall have sustained thereby in *an action of trespass, or on the case*, at the election of the plaintiff." Therefore in this action of trespass which the plaintiff

Trespass will not lie for an irregular distress, where the irregularity committed of, is not in itself an act of trespass, but consists merely in the omission of some of the forms required in conducting the distress, such as procuring goods to be appraised before they are sold. The true construction of the provision in 11 G. 2. c. 19. § 19, that the party may recover compensation for the special damage he sustains by an irregular distress, "in an action of trespass, or on the case," is, that he must bring *trespass*, if the irregularity be in the nature of an act of trespass, and *case*, if it be in itself the subject matter of an action on the case.

1809.

MESSING  
v.  
KEMBLE.

had elected to bring, he was entitled to recover for the damage he had sustained from the goods being sold without a regular appraisement, and thus being disposed of under their just value.

Lord ELLENBOROUGH. The statute provides, that the party aggrieved by the irregularity of the distress, shall recover satisfaction for the special damage he has sustained; but it provides, that the distrainor shall not, by reason of any irregularity, be deemed a trespasser for such part of the conduct of the distress as is perfectly regular. It does not say that he shall be a trespasser for the irregularity, whether that consist in an act or omission, in nonfeazance or in malfeazance. The statute does not attempt to confound legal distinctions; but allows the injury done to the tenant to be a trespass or tort according to the nature of the irregularity, and gives the remedy of trespass or case according to the cause of action. Here, the distress was conducted with perfect regularity, except that the defendant omitted to have the goods appraised before they were sold. This omission was not a trespass, and the action is misconceived. The provisions and the object of 11 Geo. 2. would be entirely defeated, if this mode of proceeding were permitted. The legislature intended that the landlord should be specifically informed of the irregularity of which the tenant complains; but when the declaration states that the defendant with force and arms broke, and entered the plaintiff's house, how can he know that the real complaint against him is, that he sold the goods before they were appraised?

Even

Even in trespass for an irregular distress, it might be well if the plaintiff were to declare specially, and take up the grievance where his cause of action commences. But I am quite clear, that the present action cannot be maintained.

MESSING  
v.  
KEMBLE.

Plaintiff nonsuited.

*Marryat* for the plaintiff.

*Park and Espinasse* for the defendant.

[Attorneys, *Davies and Good.*]

In *Winterbourne v. Morgan*, T.T. 49 G.3. in which the Court held, that for remaining in possession of the goods in the plaintiff's house beyond the five days, he may declare in trespass generally, for breaking and entering his house and seizing his

goods, it was agreed that for such an irregularity as omitting the appraisement, trespass would not lie, and that the plaintiff must elect to bring trespass or case according to the nature of his injury.

### GYFFORD v. WOODGATE and another,

Thursday,  
May 16.

CASE. The declaration after setting forth a judgment obtained by the defendants against the plaintiff, stated that they sued out a writ of *fieri facias* thereupon, indorsed to levy £.71. 1 s. besides sheriff's poundage, &c.; by virtue whereof the sheriff at the defendants' request seized the plaintiff's goods to a much greater amount than was necessary; yet that the defendants before the sheriff had A.'s request and with his consent, are *prima facie* evidence for B. against A. to support a plea of licence.

In an action by A. against B. suing out a writ of *fieri facias* before the sheriff. If made any return to the first, the sheriff's returns to the first and second writs, stating that the execution was so conducted at

1809.

GYFFORD

v.

WOODGATE.

made any return to the said writ, and before they could lawfully sue out another writ of execution on the said judgment; wrongfully and maliciously sued out an *alias fieri facias*, under colour and pretence thereof, indorsed to levy £. 72. 2 s. 4 d. besides poundage, &c.; whereby the plaintiff was put to unnecessary expence, and was greatly harrassed and oppressed &c.---In addition to the general issue, the defendants pleaded a *licence*; which was denied by the plaintiff in his replication.

The writ of *fieri facias* being given in evidence on the part of the plaintiff, the following return annexed to it was required to be read by the defendant's counsel as part of the instrument given in evidence by the plaintiff, and though resisted by the plaintiff's counsel, was directed to be read by his Lordship. It run thus: "By virtue of the writ annexed, I have seized and taken in execution the goods and chattels of the within named Edward Gyfford in my bailiwick hereafter mentioned, to be sold and disposed of, and at the request of the within named Edward Woodgate the elder, and Edward Woodgate the younger, the plaintiffs, and Edward Gyfford, the defendant, I kept and retained the same in my custody until the return of the annexed writ; and at the return thereof, in pursuance of an agreement made between the said plaintiffs and the defendant for that purpose, a writ of *alias fieri facias* returnable, &c. indorsed to levy £. 72 2s. 4d. besides sheriff's poundage, &c. was delivered to me the said sheriff; and at the request of the within named Edward Gyfford, I forbore to sell

sell the same until the 26th of August last, when I sold and disposed of the same for the sum of £.110 17s., and paid and applied the same as stated and set forth in my return to the writ of *alias fieri facias*.

1809.  
Girrod.  
v.  
Woodgate.

To the *alias fieri facias* (also given in evidence) the sheriff made a very special return, stating, that he had paid to the now defendants the sum indorsed on the writ; that he had disposed of other part of the money for which the goods sold, in payment of rent and taxes, for which the now plaintiff was liable; and that he had always been ready to pay to the latter the residue thereof, if he would accept the same.

*Park*, for the defendants, contended, that these returns were conclusive evidence in support of the plea of licence, and shewed that whatever irregularity might have occurred in the execution, had been sanctioned by the plaintiff himself.

*Garrow, contra*, denied that the plaintiff, who was no party to them, could be affected by any thing which they contained. The process of execution in this instance had been clearly sued out and acted upon contrary to the practice of the court, and the rules of law, and it lay with the defendants to shew the plaintiff's licence and consent, from what he himself had said or done.

**Lord ELLENBOROUGH.** I am of opinion, that it is incumbent on the plaintiff to contradict the facts stated in these returns. Faith is given to what

1809.

Gifford  
v.  
Woodgate.

the sheriff states in this manner, even where third persons are concerned. If he returns a rescue, an attachment issues in the first instance (*a*). I consider this, however, as only *prima facie* evidence. Upon an indictment for a rescue, it would be open for the defendant to shew that the return was false (*b*). Here you are at liberty to contradict any of the facts stated in the returns to these writs ; but if you do not, I must presume that there was an agreement of the nature stated between the parties, and that the plaintiff has no cause of action.

Plaintiff nonsuited.

In the ensuing term a new trial was moved for, on the ground that the returns to the writs were no evidence against the plaintiff, being made on the suggestion of the defendants ; but the court refused a rule to shew cause, saying, that if the plaintiff had not given his consent in the manner stated, his remedy was by an action for a false return against the sheriff.

*Garraway, Gurney, and Curwood* for the plaintiff.

*Park* for the defendant.

\* [Attorneys, *Duff and Laudkin.*]

(*a*) *Rex v. Elkins*, 4 Burr. 2129. 2 Salk. 586. Cas. temp. Hargw. 112.

(*b*) 2 Hawl. P. C. c. 21, s. 4.

If a copy of any document which itself is not evidence at common law, be made evidence by act of parliament, a copy must be produced, and the original is not made admissible evidence by implication.

*Burdon v. Rickets*, sittings after E. T. 1809.

—Replevin.—Avowry, stating that the avowant had purchased the land tax assessed upon the *locus in quo*, and that he distrained for six years arrears which were due. Plea in bar, denying the purchase.

To prove this, the avowant offered in evidence the original contract between him and the

commissioners for the redemption of the land-tax.

By 42 C. 3. c. 116, s. 165. it is enacted, that a *copy* of the contract with the commissioners shall be legal evidence, and it was contended that if a copy was evidence, the original from which the copy was taken could not possibly be rejected.

But Lord ELLENBOROUGH refused to admit the original, saying, that upon the general principles of law it was not evidence for the purpose for which it was produced, and that the statute cited must be confined to copies of the contract, which alone it specified.

1809.

GYFFORD  
T.  
WOODGATE.

### HODGKINSON v. MARSDEN.

Friday,  
May 19.

THIS was a writ of inquiry to assess damages under 8 & 9 W. 3. c. 11, § 8. To a declaration in the common form in debt upon bond, the defendant demurred, and the plaintiff obtained judgment on demurrer. After the entry of judgment, the plaintiff suggested on the roll, that the bond mentioned in the declaration was subject to a condition for the payment of an annuity, and assigned as a breach that five quarters of this annuity were in arrear.

In debt on bond conditioned for the performance of covenants, if the condition is not set out in the pleadings, the plaintiff in executing a writ of inquiry under 8 & 9 W. 3. c. 11, must prove that the bond mentioned in the suggestion and produced to the court was brought.

jury, is that on which the action

Laces

*1809.* *Lawes* for the plaintiff, at first satisfied himself with putting in a bond which appeared to have such a condition as that mentioned in the suggestion.

*HODGKIN-  
SON  
v.*

*MARSDEN.* *Peake, contra*, insisted that it was requisite to go farther, and to prove that the bond produced was the same with that upon which the judgment was obtained; as there might be two bonds executed by the defendant on the same day, and in the same penal sum, with perfectly different conditions. If the plaintiff had set out the condition in the declaration, the case would have been quite different; but as the record stood, the defendant had had no opportunity of controverting the fact that the bond on which judgment was suffered was conditioned in the manner alleged. He could not plead to the suggestion; but the plaintiff was bound to prove the facts which were suggested.

Lord ELLENBOROUGH was of opinion, that the production of a bond with a condition according with the suggestion was insufficient, and that the plaintiff ought to prove that the bond produced was the same with that on which the action had been brought, of which profert had been made in the declaration, and on which the judgment had been obtained.

This evidence was given by the plaintiff's attorney, and a verdict passed for the arrears of the annuity.

*Lawes* for the plaintiff.

*Peake* for the defendant.

[Attorneys, Pearce and Settree.]

1809.

## ROGERS v. KELLY.

Saturday,  
May 20.

THIS was an action for money had and received, to recover the sum of 130*l.* under the following circumstances:

The plaintiff having indorsed a bill drawn by one L. C. for 130*l.* payable at Messrs. Austins & Co. and finding that it would not be honoured by the acceptor, paid in this sum of money to the bankers for the purpose of retiring it. The defendant held another bill of exchange for the same sum, accepted by the same person, due the same day, and payable at the same place. The latter bill being presented for payment first, and no funds being provided to pay it, the bankers' clerk, by mistake, gave the defendant the 130*l.* paid in by the plaintiff to satisfy the bill to which he had put his name.

*A. pays a sum of money into a banker's for a specific purpose, the banker's clerk, by mistake, pays this money to B. who has no right to it.*

*Held, that A. cannot maintain an action against B. to recover it back.*

*Garrow* for the plaintiff contended, that as the money had been paid in for a specific purpose, and as the very money paid in had been given by mistake to the defendant, it was to be considered as *ear-marked*, and might be followed by the person to whom it really belonged.

*Lord ELLENBOROUGH.* There is no privity between the parties to this suit. The plaintiff's claim is on the bankers, and they must seek their remedy against the defendant the best way they can. The plaintiff's

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ROGERS  
v.  
KELLY.

plaintiff's money must still be considered as in the hands of the bankers. His account with them is the same as if this mistake had not been committed.

Plaintiff nonsuited.

*Garrow and Puller* for the plaintiff.

*Park* for the defendant.

[Attorneys, *Kibblewhite and Richardson.*]

Vide *Anonymous*, 1 Salk. 289. *Robson v. Eaton*, 1 T. R. 62

Saturday,  
May 20.

### STEINMAN and others v. MAGNUS.

A man's creditors enter into an agreement with him not under seal, to take 20*l.* per cent. upon their respective debts in satisfaction of the whole; —10*l.* per cent. to be paid within a month, and the remaining 10*l.* per cent. to be secured by the acceptances of a third person at 5 and 9 months. The composition is paid pursuant to the agreement.—A creditor who has signed the agreement and received the composition, cannot afterwards bring an action for the residue of his debt.

THIS was an action by the payees, against the drawer of two bills of exchange, dated 10th October 1804, the one for 400*l.* and the other for 376*l.* 4*s.* 1*d.* payable respectively at 6 months after date.

The defence was, that the plaintiffs along with the other creditors of the defendant, had signed an agreement not under seal, of which the following is a copy:

“ We the undersigned being respectively creditors of Moses Magnus, of Great Somerset Street, Whitechapel, in the county of Middlesex, do hereby

" hereby agree for ourselves respectively, to take  
 " and accept 20*l.* per cent. in full payment and  
 " satisfaction of our several and respective debts  
 " due at the date hereof, and upon payment of the  
 " said 20*l.* per cent. we hereby release and for ever  
 " discharge the said Moses Magnus, his heirs, exe-  
 " cutors, and administrators, and every of them for  
 " ever, as to the remaining 80*l.* per cent.; and it is  
 " hereby agreed to receive the said 20*l.* per cent. in  
 " manner following; that is to say, 10*l.* per cent.  
 " upon or within one month after the execution of  
 " these presents, 5*l.* per cent. secured by the accept-  
 " ance of Mr. Garland, of Bunhill Row, payable in  
 " five months, and the remaining 5*l.* per cent. on the  
 " like acceptance payable in nine months. Dated this  
 " 11th day of November 1806."

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 STEINMAN  
 v.  
 MAGNUS.

Signed, &c.

The defendant's counsel offered to prove in addition to this, that the plaintiff's were paid the composition of 20*l.* per cent. pursuant to the terms of the agreement; that they were active in procuring other creditors to sign it; and that the defendant had been put to considerable expence in consequence of this agreement.

Park for the plaintiffs, insisted that these facts furnished no defence at law to the present action, and relied upon the authority of *Fitch v. Sutton*, 5 East 230, in which it was held, that the acceptance of a less, cannot be a satisfaction in law of a greater sum than due. If payment of a sum short of the debt did not operate as satisfaction, no more could a security for such a sum by whomsoever it might be given.

Lord

1809.

SILINMAN

p.

MAGNUS.

Lord ELLENBOROUGH was inclined to think, that this case was ruled by *Fitch v. Sutton*, and the plaintiff had a verdict.

But in Trinity Term following, the case was fully argued in shewing cause against a rule for setting aside the verdict, and granting a new trial. And the Judges were all clearly of opinion, that the facts offered to be proved on the part of the defendant, amounted to a good defence at law to the action. They thought that this case was distinguishable from *Fitch v. Sutton*, as it did not appear there that third persons were concerned; and that the fraud here practised upon the other parties to the agreement, brought the case within the principle of *Cockshot v. Bennett*, 2 T. R. 763. If it had not been for this agreement, it might have been impossible for the plaintiffs to recover so much as 20% per cent, upon the amount of their debt, and the security they obtained from Garland was a valuable consideration for their releasing the residue. But it would be a fraud upon Garland, if the defendant could still be sued, in breach of the agreement, for the full amount of his debts.

Lord ELLENBOROUGH observed, that if the facts of the case had been particularly presented to his mind at the trial, he should certainly have held that upon their being proved the plaintiffs ought to have been nonsuited.

*Rule absolute.*

*Park and Marryat* for the plaintiffs.

*Garrow and Comyn* for the defendant.

[Attorneys, *Wood and Jones.*]

1809,

## COWARD v. MABERLEY.

Wednesday  
24.

**D**EBT on 5 Eliz. c. 4. § 31, for setting up and exercising the trade of a blacksmith, without having served an apprenticeship thereto of seven years.

The witnesses stated, that the defendant is an eminent coachmaker in this town; that by workmen immediately employed by himself, he does all the various sorts of work required for the construction of coaches; that besides painters, carpenters, &c. he constantly keeps in his service ten or twelve journeymen blacksmiths; that those employed during the period mentioned in the declaration had served (although he had not) an apprenticeship of seven years to the business of a blacksmith; and that he did not exercise that business on any occasion by itself, but only incidentally, in as far as it was connected with coach-making.— There were no counsel for the defendant; but—

A man is not liable to penalties under 5 Eliz. c. 4. as for exercising a trade without having served an apprenticeship to it, who merely exercises the trade incidentally as a branch of his general business. Therefore, a master coachmaker may lawfully keep journeymen blacksmiths in his employ to make the iron work of coaches, although he has not served an apprenticeship to the trade of a blacksmith.—So of a master carpenter and journeymen sawyers.

Lord ELLENBOROUGH said, he was quite clear this case was not within the statute, and that any man might lawfully carry on particular branches of a general business by such as had served an apprenticeship to those particular branches of the business in which they were employed.

*Garrow and Marryat* for the plaintiff, contended, that this section of the statute created two distinct

1809.

COWARD  
v.  
MABERLEY

tinct offences, viz., exercising any trade without having served an apprenticeship, and setting others to work who had not. If the defendant's journeymen smiths were of the description stated, he had not been guilty of the latter offence; but he certainly had committed the former, by himself exercising the trade of a master blacksmith. A man might carry on several trades at the same time; but by multiplied breaches of the statute he was not to save himself from its penalties.

**Lord ELLENBOROUGH.** The defendant has not been proved to have set up or to have exercised the trade of a blacksmith. Blacksmith's work may be required in building a bridge; but the builder who employs a journeyman properly qualified to do that work, is not himself to be considered as carrying on the trade of a blacksmith. The statute applies only to those who substantively set up and exercise a trade without having served an apprenticeship. The smith's work done by the defendant is only incidental to his general business of a coachmaker, and he might as well be prosecuted as a carpenter, a painter, or a wheelwright. I suppose he had been advised that the law being so clearly in his favour, it was not worth his while to waste his money in feeing counsel to defend him.

Verdict for the defendant.

*Garrow* afterwards stated, that the same doctrine had been laid down by Mr. Justice Lawrence in an action

action against a master carpenter for carrying on  
the business of a sawyer.

[*Attorneys, Matthew and Seymour.*]

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v.  
MABERLEY

Vide *Reynard v. Chase*, 1 Burr. 2.—*Beach v. Turner*, 4 Burr. 2449.—*Trench v. Adams*, 2 Wils. 168.—*Beale v. Geale*, *ante*, 1.

BLOGG and others, Assignees of HARRIS, a Bank-  
rupt, v. PHILLIPS and another, late Sheriff of  
Middlesex.

Wednesday,  
May 24.

## TROVER for jewellery.

The goods in question were taken in execution by the defendants on the 7th of July last, and it was proved that the bankrupt had committed an act of bankruptcy in the May preceding; but that the commission was not sued out against him till the 1st of October following. The goods were sold on the 20th July, and on the 30th of the same month, the money was paid over to the person at whose suit they were taken in execution.

*Park* for the defendants contended, that this case was within Sir S. Romilly's act, 46 Geo. 3. c. 135. § 1. whereby it is enacted, that "all payments by and to, and all contracts, and other dealings and transactions, by and with any bankrupt, *bonâ fide* made or entered into more than two calendar

If the goods of a trader are taken in execu-  
tion after an  
act of bank-  
ruptcy, and the  
money arising  
from the sale  
paid over by  
the sheriff, two  
months before  
a commission is  
sued out, the  
bankruptcy will  
overreach the  
execution, not-  
withstanding  
46 G. 3. c. 135.  
which protects  
all *bonâ fide*  
payments and  
transactions by  
or with the  
bankrupt more  
than two calen-  
dar months be-  
fore the date of  
the commission.

1809.  
B. 666  
v.  
PHILLIPS.

months before the date of the commission, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed." Now this might be considered as a payment by the bankrupt of the sum recovered by the judgment, and at any rate, it was a *bond fide transaction* with the bankrupt.

Lord ELLENBOROUGH. There is no pretence for calling this a payment by the bankrupt, and the meaning of the word *transactions* must be determined by the words used along with it, viz. "contracts and other dealings." The transactions protected by this clause of the statute are evidently transactions between the parties in the ordinary course of business, not transactions carried on through the medium of legal process.

The plaintiffs had a verdict for the produce of the goods, making a deduction for the expences of the sale, but not for the sheriff's poundage.

*Garrow and Laces* for the plaintiffs.

*Park and Marryat* for the defendants.

[Attorneys, Holloway and Smith.]

But see 49 G. 3. c. cxxi. s. 2.

1809.

## REX v. JONES.

THIS was an indictment against the defendant for frauds committed by him in his office of Commissary General in the West Indies. In the course of the trial some points arose worthy of being noticed.

The defendant in the warrant for his appointment under the King's sign manual, is directed to obey all orders issued to him by the Lords Commissioners of the Treasury. On the part of the Crown there was offered in evidence a letter addressed to him, containing certain instructions he was accused of disregarding: this letter, signed by Mr. Pitt and two more of the then Lords of the Treasury, he had received in the West Indies, and it was now produced by his solicitor under a notice to produce all letters, &c.

The defendant's counsel contended, that before this letter could be read in evidence, it was necessary to prove, that Mr. Pitt and the two others who signed it, were Lords Commissioners of the Treasury, and had authority to write it, by producing the commission by which they were appointed. But

Lord ELLENBOROUGH held, that this was unnecessary, and the letter was admitted on proof of the hand-writing of the three persons who had signed it as Lords Commissioners of the Treasury.

At one stage it was a material question, whether on the part of the Crown they could avail them-

ing a man, upon one indictment, for several distinct misdemeanours of the same nature.

There is no  
objection to  
any sort to try-

1809.

REX

v.

JONES.

selves of two counts of the indictment, so as to give evidence of part of the sums which the defendant had illegally obtained, under one count, and of the residue, under another.

The defendant's counsel urged that this could not be done, as it would be trying a man for two offences on the same indictment.

LORD ELLENBOROUGH.—In point of law, there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanours. It is the daily usage to receive evidence of several libels and of several assaults upon the same indictment; and here I see not the slightest objection to evidence of various acts of fraud committed by the defendant in his office of commissary general, though ranged under different counts as distinct and substantive misdemeanours. (a)

A person indicted for a misdemeanour or a felony, may be legally convicted upon the uncorroborated evidence of an accomplice.

The defendant's counsel afterwards contended that the case on the part of the crown rested entirely on the evidence of an accomplice; that this witness was not confirmed, and that therefore the defendant could not be legally convicted.

LORD ELLENBOROUGH. No one can seriously doubt that a conviction is legal, though it proceed upon the evidence of an accomplice only. Judges

(a) *Vide Rex v. Kingston*, 8 East, 41.

in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only in as far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts which he deposes. It is allowed, that he is a competent witness; and the consequence is inevitable, that if credit is given to his evidence, it requires no confirmation from another witness. Within a few years, a case was referred to the 12 Judges, where four men were convicted of a burglary upon the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the Judges were unanimously of opinion, that the conviction as to all the four was legal, and upon that opinion they all suffered the sentence of the law. (b) Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them. In the case before the court, the witness alluded to cannot be considered an accomplice; and if he were, he is amply confirmed.

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REX  
v.  
JONES.

The defendant was found guilty.

*The Attorney General, Garrow, Abbott, and Richardson, for the Crown.*

*Dallas, Park, Topping, and Marryat, for the defendant.*

[*Attorneys, Litchfield and Dennett & Co.*]

(b) Atwood's Case, 2 Leach, Cro. Cas. 521. Durham's Case, ib. 538. *acc.*

1809.

Saturday,  
May 27.

## REX v. LEEFE, Gent. one, &amp;c.

If a count in an indictment for perjury undertake to set out continuously the substance and effect of what the defendant swore when examined as a witness; it is necessary, in support of this count, to prove, that in substance and effect he swore the whole of that which is thus set out as his evidence, although the Count contains several distinct assignments of perjury.

THIS was an indictment for perjury before a select committee of the House of Commons, appointed under the *Grenville Act*, to try the merits of a petition complaining of an undue election and return of members to serve in parliament for the borough of New Malton, in the county of York.

The counsel for the prosecution having failed upon the first count of the indictment, resorted to the second; and as a point of great nicety and importance arose upon this, it must necessarily be set out pretty much at length.

After stating that the select committee was duly appointed, and met to determine the merits of the petition, and that the defendant appeared as a witness, and was sworn before the committee, who had competent power to administer an oath to him in that behalf--the second count proceeded as follows : " And the said Edward Leefe being so sworn as aforesaid, it then and there became and was a material question, touching the merits of the said petition, whether the said Lord Headley [one of the members returned] before the close of the said election, had made any agreement to pay certain expences of the said Isaac Leatham, one of the candidates at the said election, including the expences incurred at different inns in the said borough where the friends of the said Isaac Leatham had dined, in consideration of the said Isaac Leatham

Leatham declining to be a candidate at the said election, and of the voters of the said Isaac Leatham then unpolled being applied to for the purpose of voting for the said Lord Headley at the said election; and also, whether the said Edward Leefe had communicated to certain persons, being the committee of the said Isaac Leatham at the said election, that the said Lord Headley had made such agreement; and also, whether the said committee of the said Isaac Leatham at the said election had dispersed to make known such agreement, and to carry the same into effect; and also, whether the said Edward Leefe had told the said Isaac Leatham that the said Lord Headley had given his assurance to the said Edward Leefe, that the said expences should be secured: Whereupon the said Edward Leefe not having the fear of God before his eyes, &c. on the said, &c. on his oath aforesaid, falsely, &c. did say, depose, swear, and give in evidence upon his oath aforesaid, to the said committee, touching the said material questions and the merits of the said petition, *in substance and effect* as follows; that is to say, that he the said Edward Leefe, by the directions of the said Isaac Leatham, waited upon the said Lord Headley at the King's Head in the borough of New Malton, on the second day of the said election, and before the close thereof, and proposed to the said Lord Headley, that the said Isaac Leatham would decline, upon the expences being paid him, including previous expences of the day before; and that the said Lord Headley then and there agreed that the said expences should be paid, including the expences that had been

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incurred at different inns in the town where the said Isaac Leatham's friends had dined ; and that the said Isaac Leatham's voters (meaning such as were then unpolled) were to be applied to in consequence of that arrangement (meaning in consequence of the said Isaac Leatham's declining upon such expences being agreed to be paid to him as aforesaid), for the purpose of voting for the said Lord Headley ; and that he the said Edward Leefe enumerated the expences, and told the said Lord Headley that the expences so to be paid, must include the expences of the different inns in the town of New Malton aforesaid ; and that he the said Edward Leefe, upon his return to the committee of the said Isaac Leatham at the said election, communicated to them what had so passed between the said Lord Headley and him, (meaning that he the said Edward Leefe communicated to the said committee, that such agreement had been made as last aforesaid), and that the said committee of the said Isaac Leatham dispersed to make known the said agreement, and to carry it into effect ; and that he the said Isaac Leatham asked the said Edward Leefe if the expences were secured ; and that he the said Edward Leefe told the said Isaac Leatham that his Lordship, (meaning the said Lord Headley) had given his assurance *that it should be so* : Whereas, in truth and in fact, the said Lord Headley did not make any such agreement with the said Edward Leefe as aforesaid ; and whereas, in truth and in fact, the said Edward Leefe did not enumerate the expences, nor tell the said Lord Headley that the expences so to be paid must include the expences of

of the different inns in the said town ; and whereas, in truth and in fact, the said Edward Leefe did not communicate to the said committee of the said Isaac Leatham, that such agreement had been made as last aforesaid ; and whereas, in truth and in fact, the said committee of the said Isaac Leatham did not disperse to make known any such agreement, or to carry any such agreement into effect ; and whereas, in truth and in fact, the said Edward Leefe did not tell the said Isaac Leatham that his Lordship had given his assurance *that it should be so*, or that the said expences should be secured : And so, &c.

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• A short hand writer being called, stated the evidence which the defendant had given before the committee, and which agreed exactly with that set out in the second count of the indictment, except in the concluding sentence. The indictment states that to have been, " that his Lordship had given his assurance *that it should be so.*" The short hand writer swore, that all he found upon his note in answer to the question upon this subject was, " that his Lordship had given his assurance."

*The Attorney General* for the defendant, insisted, that as these representations of the defendant's evidence before the committee, were in *substance and effect* materially different, the defendant was entitled to an acquittal.

*Scarlett* and *J. Williams*, of counsel for the prosecution, allowed that they could not proceed upon the last assignment of perjury ; but contended, that the words as to the others were substantiated, and

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as these were upon questions material to the merits of the petition, the second count of the indictment was sustained, and the defendant ought to be found guilty. It was averred that the defendant deposed before the committee, “ touching the *said material questions*, and the merits of the said petition *in substance and effect* as follows :” This must be taken to mean, that he deposed to each of these questions the answer connected with it. *Reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. Therefore, if he was proved to have falsely and corruptly sworn in substance and to the effect as set out in the indictment to any of these questions, it was quite sufficient. Otherwise, it would be nearly impossible to convict any man of perjury, and the more numerous the instances in which he perjured himself on any occasion, the greater would be his chance to escape.

Lord ELLENBOROUGH. Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant's evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance, Did you ever know

know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to shew, that under *secundum substantiam*, you are not bound to prove the *substance* of what you state, as under *secundum tenorem*, you are bound to prove the *tenor*. To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record, should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts. There are facilities enough for convicting and punishing the guilty without infringing any of the rules of law. In the absence of authorities in support of the doctrine contended for, I will not originate one, and place this defendant in a state of peril in which no person charged with the same crime ever stood before. (a)

Another count of the indictment stated, "that heretofore to wit, on the 11th day of May, in the 47th year, &c. at the borough of New Malton, it was averred, that an election was had for a borough "by virtue of a certain precept of the high sheriff of the county by him duly issued to the bailiff of the said borough of N. M." Held, that this was not a description of the precept, and that although the borough was therein differently denominated, the variance was immaterial.

(a) I find no decision of dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the

general principles upon this subject, *Vide 2 Hawk. P. C. c. 46. s. 34, 35, 36. Compagnon v. Martin, 2 Bl. Rep. 790.*

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In an indictment for perjury before a select committee of the House of Commons, it

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the county of York, an election of two burgesses of the said borough, to serve as burgesses for the same at a certain parliament of our said Lord the King, to be holden at Westminster on the 22d day of June then next ensuing, was duly had and held, *by virtue of a certain precept of the high sheriff of the county aforesaid by him duly issued to the bailiff of the said borough of New Malton*, according to the exigency of a certain writ of our said Lord the King under his great seal of the United Kingdom of Great Britain and Ireland, before then duly issued and directed to the said sheriff; and that afterwards, by virtue of the said precept and writ, on the 12th day of May, in the said 47th year, &c. the honourable Robert Lawrence Dundas, and the right honourable Charles Winn Allanson, Lord Headley, *were returned to serve as burgesses for the said borough of New Malton*, at the said parliament then holden at Westminster aforesaid.

The precept of the sheriff being produced, appeared to be directed, "To the bailiff of the borough of *Malton*."

*The Attorney General* objected that this was a variance, as the indictment averred that the precept was issued to the bailiff of the borough of *New Malton*, which must be taken to be different from the borough of *Malton*.

**Lord ELLENBOROUGH.** This is not matter of description. If the precept was actually issued to the bailiff of the borough of *New Malton*, it is sufficient, whatever may be the tenor of the direction.

The

The return made to the Crown Office stated, that the honourable R. L. Dundas and lord Headley were elected and returned as burgesses for the borough of *Malton*.

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*LIBER.*  
But the indictment having stated that "A. B. and C. D. were returned to serve as burgesses for the said borough of N. M." this was considered a description of indenture of return, and the borough being therein styled the borough of M the variance was held fatal.

*The Attorney General* contended, that the allegation in the indictment must mean that these individuals were returned by the indenture, the only way in which the return could be made; which indenture proved that they had been returned for Malton, not for New Malton. Thus an averment, upon the truth of which the legality of all the subsequent proceedings depended, was left without evidence.

*Searle* for the prosecution insisted, that the indictment did not profess to set out the tenor of the return or the manner in which the members were returned; it simply stated the fact, that they were returned to serve as burgesses for the said borough of New Malton, which appeared sufficiently from the journals of the House of Commons concerning this election, in which the borough of Malton and New Malton were used indiscriminately.

*Lord ELLENBOROUGH.*--The averment as to the return must be understood as a description of a something in writing. The precept given in evidence requires an election to be made for the borough of Malton, and the return states that the honourable R. L. Dundas and lord Headley were elected to serve for the borough of Malton. But it is laid in the indictment, that they were returned for the borough of *New* Malton. Here it is not enough

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enough that the borough is known as well by one name as the other. I think the variance is fatal, and the defendant must be acquitted.

*Not guilty.*

*Scarlett and J. Williams* for the prosecution.

*The Attorney General, Garrow, Park, Topping, and Abbott*, for the defendants.

[Attorneys, *Eyre and Morton.*]

*Vide Purcel v. M'Namara, 9 East, 157.*

Saturday,  
May 27.

### REX v. WELTJE.

An indictment  
will not lie for  
words spoken  
of a justice of  
the peace in his  
absence.

THIS was an indictment for saying of ----- *Girdler*, esq. a Justice of Peace for the county of Middlesex, that he was *a scoundrel and a liar*. The words were charged to have been spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity.

It appeared that at a vestry meeting for the parish of Hammersmith, which Mr. Girdler did not attend, Mr. Weltje, with reference to a private quarrel between them, called him several very abusive names, declared he should have said the same had Mr. Girdler been present, and being reminded that he was speaking of a magistrate, said, he knew that very well.

Lord

**Lord ELLENBOROUGH.** The words not being spoken *to* the Justice, I think they are not indictable. This doctrine is laid down by Lord Holt in a case in *Salkeld* (*a*), and in *Rex v. Pocock*, in *Strange* (*b*), the court of K. B. refused to grant an information for saying of a justice in his absence that he was *a forsworn rogue*.—However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say, whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, this indictment is not supported, and it could not by any possibility be a misdemeanour to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex.

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The defendant was acquitted.

Garrow, Knapp, Alley, and Glced, for the prosecution.

The Attorney General and Gurney for the defendant.

[Attorneys, Aldridge and Impcy.]

(*a*) *Regina v. Wrightson*, or *a bufflehead*, is not indictable." *Quod fuit concess. per 2 Salk. 698. per Holt, C.J.* "To say a justice is *a fool*, or *an ass*, or *a coxcomb*, or *a blockhead*, (*b*) 2 Str. 1157.

Vide Rex v. Revel, 1 Stra. 420.

1809.

Monday,
May 29.

GREMAIRE v. LE CLERC BOIS VALON.

Sembler, that notwithstanding 3 H. 8. c. 11, which enacts, that no one shall practise as a surgeon in London, or 7 miles round, without being licensed by college of surgeons, under the penalty of 5l. a month; a person who is not so licensed may maintain an action for business done as a surgeon within these limits, the statute containing no prohibitory clause: And at any rate, it is incumbent upon the defendant in such action to give evidence that the plaintiff is not regularly licensed as the statute directs.

INDEBITATUS assumpsit for work and labour, &c. Plea, the general issue.

It appeared that the parties to this suit are both French emigrant priests, resident in London, and that the plaintiff had cured the defendant of the *lues venerea* after a long attendance, in the course of which he had applied medicines to external sores, and performed several surgical operations. An acknowledgment by the defendant was given in evidence, that for this cure he owed the plaintiff 20l.

Clifford for the defendant contended, that the action could not be maintained, as the plaintiff was not a member of the college of surgeons. By statute 3 Hen. 8. c. 11. § 1. it was enacted, that to prevent smiths, weavers, and women, who took upon themselves great cures, in which they used sorcery and witchcraft, from intermeddling with surgery, no one within the city of London or seven miles round, should act as a surgeon, without being examined and admitted in the manner therein pointed out, under the pain of forfeiture of 5l. for every month any person should so act as a surgeon. And although by 34 & 35 Hen. 8. c. 8. § 3. liberty was given to any person having knowledge and experience of the nature of herbs, roots, and waters, &c. to practise, use, and minister,

minister, in and to any outward soye, uncome, wound, &c. any herbs, ointments, &c. according to their cunning, experience, and knowledge; it was clear from the preamble to the statute, that this must be done gratuitously; the grievance there stated, being, that “the company and fellowship of surgeons of London, minding only their own lucre, had sued, troubled, and vexed divers honest persons, whom God had endued with the knowledge of the nature, kind, and operation of certain roots, herbs, and waters, *and yet the said persons had not taken any thing for their pains and cunning, but had ministered the same to poor people only for neighbourhood and God's sake, and of pity and charity.*” Accordingly, it was laid down in Com. Dig. tit. “*Physicians,*” (D.) that “this statute extends only to good women in the country, &c. who act for charity; not to those who administer for profit.” Thus it clearly appeared, that the plaintiff in acting as a surgeon for profit, was guilty of a breach of the law; and therefore could not maintain an action to recover a compensation for what was illegal.

Garraw, contra, insisted that there being no absolute prohibition of persons unlicensed acting as surgeons, they might maintain an action against persons whom they had attended and cured. By paying the penalty of 5*l.* a month, they satisfied the statute. Besides, 34&35 Hen. 8. seemed framed for this very case, and being silent as to any reward to be received for such cure, the law must raise a promise on the part of the patient to pay his

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1809. surgeon upon a *quantum meruit*, and never could annul an express promise which had here been given in evidence.

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Lord ELLENBROOUGH was of opinion, that the action was maintainable, and the plaintiff recovered a verdict for 20*l.*

In the ensuing term, Clifford obtained a rule to shew cause, why the verdict should not be set aside, on the ground that the plaintiff's conduct in practising as a surgeon was illegal, and that he could not be entitled to recover a compensation for his labour on the very same evidence which would convict him of the penalty of 5*l.* a month. But when cause was shewn, the court said it had not been proved, that the plaintiff was not regularly licensed as a member of the college of surgeons, which he might be, although he was a French emigrant priest.—Rule discharged.

Garrore and Lawes for the plaintiff.

Clifford for the defendant.

[*Attorneys, Raphael and Wright.*]

*Vide Johnson v. Hudson, 11 East, 180. and Law v. Hodgson,
next case.* "

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LAW v. HODGSON.

Monday,
May 29.

THIS was an action for goods sold and delivered, to recover the value of between five and six thousand bricks, which the defendant had bought from the plaintiff, a brick-maker; which he had himself selected from a large clamp of bricks at the plaintiff's manufactory; and which he had employed in building a house.

The defence was founded on 17 Geo. 3. c. 42. § 1. which enacts, that "all bricks which shall be made or burnt for sale in any part of England, shall, *when burnt*, be not less than eight inches and a half long, and not less than two inches and a half thick, *and not less than four inches wide.*"

Sec. 2. of the same statute enacts, that if any person shall make bricks for sale of less dimensions, he shall forfeit the sum of 20s. for every thousand bricks so made.

It was proved that the bricks which were the subject of this action, were not, upon an average, more than 3½ inches wide, and that they all fell short of the legal width of *four inches.*

Garrow for the plaintiff, contended, that the action was nevertheless maintainable. The legislature only meant to prohibit the making of bricks less than certain prescribed dimensions under a penalty, but did not declare all contracts concerning them

An action cannot be maintained by a brickmaker for the price of bricks which are under the standard dimensions required by stat. 17 G. 3. c. 42. although, when sold, they were selected by the purchaser himself, and they were afterwards used by him in building a house, without any complaint being made as to their size or quality.

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null and void. The plaintiff might be liable to a penalty for making these bricks, and still be entitled to recover the value of them from the defendant. But in truth, it was quite impossible for a brick-maker to conform in every instance to the parliamentary standard ; as bricks made in the same mould shrunk very differently in the burning, and it was therefore necessary to look to the honest intention of the brick-maker, which could not be doubted in the present instance. This defendant was, at all events, estopped from taking the objection, as he himself selected the bricks from a great many others, and by using them without any complaint of their size till the present day, he had given conclusive evidence of their sufficiency.

LORD ELLENBOROUGH. The penalty upon making bricks under the proper size is inflicted by a distinct section. The first section of this statute absolutely forbids such bricks to be made for sale. Therefore the plaintiff in making the bricks in question was guilty of an absolute breach of the law ; and he shall not be permitted to maintain an action for their value. The manufacturer must take care that his bricks are of the statuteable size, and calculate the degree in which they are likely to shrink in the burning. The legislature has considered this to be practicable, and difficulty of compliance is no excuse for neglecting to do that which the legislature requires. The defendant when i.e selected the bricks is not proved to have known that they were under-sized, and his using them cannot alter the law.

Plaintiff

Plaintiff nonsuited.

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Garrow in the following term moved to set aside the nonsuit; but the court refused a rule to shew cause saying, that the best way to enforce an observance of the statute was, to prevent the violation of it from being profitable.

Garrow and Bolland for the plaintiff.

Park for the defendant.

[Attorneys, *Willoughby and Dulston.*]

(a) *Vide Johnson v. Hudson*, 11 East, 180.—*Gremaire v. Le Clerc Bois Valon*, ante, 144.

HEYMAN and others v. PARISH,

Wednesday,
May 31.

THIS was an action on a policy of insurance on the ship Canopus, at and from Plymouth to Gottenburgh.

Sembler, that if a declaration on a policy of insurance lay the loss by the perils of the seas, the plaintiff may recover, upon proof that the ship was wrecked, although this may have been occasioned by the baratry of the master or mariners.

The declaration stated, that *by the perils and dangers of the seas*, and by the force and violence of the winds and waves, the ship struck upon rocks, and was thereby bulged; broken, and filled with water, wrecked, cast away, foundered, sunk, and wholly lost to the persons interested therein.

The plaintiffs' witnesses swore, that while the ship was working out of Plymouth harbour, with

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a pilot on board, she missed stays, and that notwithstanding every thing was done to save her which the pilot directed, she went ashore among the rocks, and was lost.

The defence was, that the loss had been occasioned by the misconduct of the captain. In support of this case, the pilot swore, that the captain sailed in a foul wind, contrary to his directions, having before refused to sail when the wind was fair; that in several other respects he disobeyed the witness's instructions though informed of the consequences; and, finally, that the ship having been stopped when going on shore by getting out an anchor, the captain cut the cable, and allowed her to drift on the rocks.

Lord ELLENBOROUGH said, if the witness was believed, this was a clear case of barratry.

Park for the defendant, suggested, that there did not appear to be any fraud.

Lord ELLENBOROUGH. This is not necessary. It has been solemnly decided, that a gross malversation by the captain in his office is barratrous. (a)

Park then observed, that even if it were barratrous, as there was no count for barratry, the plaintiff could not recover.

Vide Earl v. Rowcroft; 8 East, 126.

Lord

Lord ELLENBOROUGH. I know that MR. JUSTICE BULLER once held, that if you declare upon a loss by perils of the seas, and the defence is, the misconduct of those on board, and that misconduct, when proved, turns out to be barratrous, you cannot recover; but I have thought about it, and never could see the reason for that doctrine. Should it come before me, I think I should hold otherwise. If the plaintiff declare for a loss by perils of the seas, he cannot recover upon a loss merely barratrous, as a fraudulent sale, or the like. But here, the loss is proved as laid, and the barratry can be no surprize upon the defendant; for it is his own case.

The jury utterly disbelieved the pilot, and the plaintiff had a verdict.

The Attorney General, Topping, Jervis, and Richardson, for the plaintiff.

Garrow, Park, and Curr, for the defendant.

[Attorneys, *Kaye & Freshfield* and *Gregg & Corfield*.]

VON TUNCELN v. DUBOIS.

Thursday,
June 1.

THIS was an action on a policy of insurance on the ship *Neptunus*, at and from Bristol to Oporto, during her stay and trade there, and at and from thence back to London.

If a ship insured is merely represented as neutral, a sentence of a foreign court of admiralty, condemning her

for a violation of the laws of neutrality, is not evidence to falsify the representation.

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The ship was not stated to be of any particular country in the policy ; but in the letter directing the insurance she was described as “ carrying the Kniphausen flag ;” and in the broker’s written instructions shewn to the underwriters, she was called a *Kniphausen vessel*.

The captain swore, that the Neptunus belonged to *Varrel*, a port in the Kniphausen territory ; that she was properly documented according to the laws and regulations of that principality ; and that she was captured on her voyage back from Oporto to London, and carried into Dunkirk.

The defence was rested on the decree of the French admiralty court, which condemned the ship for the following among other reasons : 1. That she had suffered herself to be searched by the English. 2. That she had put into an English port. 3. The inimical quality of the vessel, which in November 1805 belonged to an English subject then an enemy, and was purchased from him by the present claimant, that sort of acquisition made after the commencement of hostilities being proscribed by the regulations of 26th July 1778. 4. The deficiency as to the certificate of origin.

Park for the defendant, contended, that this sentence was a complete bar to the present action, as it proved conclusively that the ship was not neutral property, and that she had not been navigated according to the laws of neutrality. Some of the regulations which the Neptunus was charged in the sentence with having broken, might not be binding

binding upon neutral states. But in *Bolton v. Gladstone*, 5 East, 155. it was decided, that if a neutral be condemned for not conforming to a French ordinance which is not binding upon the state to which she belongs, the sentence is conclusive evidence against the assured. Lord ELLENBOROUGH there said, "the French prize court was competent to decide upon the neutrality of the ship; and if in the professed exercise of its functions, it has decided upon that point, its decision must conclude the question." Besides, it was held in *Baring v. the Royal Exchange Assurance Company*, 5 East, 99. that if in a foreign sentence there be several grounds of condemnation set forth, and one of them be a good and legal ground, it will be conclusive against the neutrality, though joined to several bad ones. Now there could be no doubt, that if the Neptunus belonged to a British subject after the commencement of hostilities between Great Britain and France, that fact was of itself a sufficient ground for the condemnation.

Lord ELLENBOROUGH. The difference between this case and those cited is, that here there is no *warranty of neutrality*. In *Bolton v. Gladstone*, the ship and goods were *warranted* Danish property; and in *Baring v. The Royal Exchange Assurance*, they were *warranted* American. Here the letter and instructions directing the insurance to be made, cannot amount to more than a *representation* that the Neptunus was a Kniphausen vessel, and consequently neutral property. Therefore, if she was in reality documented and navigated according to

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to the laws of the state to which she belonged, the sentence of a foreign court will not invalidate the policy. On the other hand, had there been a *warranty* of neutrality, the sentence might have been conclusive. In *De Souza v. Ever* (a), Lord Kenyon held that a sentence proceeding upon the violation of the particular ordinance of a belligerent state, falsified a warranty of neutrality; and though that case was afterwards doubted by Lord Kenyon himself, it has since been again set up at the Cock Pit. As to the present case, if you think, upon consideration, that there is any thing in it, you may move it in term.

The plaintiff had a verdict, which was acquiesced in.

Garrow and Marryat for the plaintiff.

Park and Richardson for the defendant.

[Attorneys, *Swain, Co. and Gibbs.*]

(a) Reported in the first four editions of Mr. Park's book on insurance, p. 361. but omitted in the subsequent editions of that valuable work, Ld. Kenyon having declared that it could not be considered as an authority. *Vide 8 T. R. 444 n.*

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KELLY and others v. WALTON.

Sittings after
M. T. 1808.

THIS was an action on a policy of insurance on a cargo of flax seed by an American ship, at and from her port or ports of loading in the United States, to her port or ports of discharge in Ireland.

On the 23d December 1807, the ship was ready to sail, with the cargo on board, from Philadelphia to Limerick, when she was detained by the American embargo (a).

The assured, residing at Limerick, were informed of this event on the 11th of February 1808, but did not give notice of abandonment to the underwriters in London, till the 11th of June following.

The plaintiffs proved that the flax-seed insured was for the purpose of sowing in Ireland; that by an Irish statute, no flax-seed can be sold for sowing in that part of the United Kingdom, unless of the growth of the preceding year; that the season for sowing commences in March, and ends on the 10th of May; and that if the embargo had been taken off after lasting a month or two, the flax-seed would probably have sold rather under the invoice price, upon its arrival in Ireland; but that after

The owner of a cargo of flax-seed insured "at and from America to Limerick," himself residing at that place, on the 11th February 1808, received information that the ship with the flax-seed on board had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th of June following. The flax-seed was intended for sowing, and might have been employed for that purpose, had it arrived before the 10th of May, but afterwards would have been scarcely of any value. Held, that however the plaintiff might have waited till the 10th of May before abandoning, the abandonment on the 11th of June was out of time.

(a) *Vide Conway v. Gray, 10 East, 536.*

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the flax-seed time was over, it could only have been crushed for oil, and would have been of very little value.

Marryat, for the defendant, insisted that the assured had not made their election to abandon in time; and cited the case of *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38. where intelligence of the loss being received on the 2d of February, an abandonment on the 18th of the same month was held too late.

The Attorney General, contra, contended that the special circumstances of this case took it out of the general rule. The plaintiffs had a right to wait while there was a possibility of the flax-seed arriving in time for being sown, and afterwards to abandon. They did not speculate for their own advantage, as the cargo, if it had arrived, would have sold at a loss, and they acted a much honester part than if they had abandoned, the moment they heard of the embargo, although it was likely to be temporary. Upon the expiration of the time for sowing, there was a new ingredient in their case; and the article insured ceasing to be of any value to them, they were entitled to come upon the underwriters for an indemnity.

Lord ELLENBOROUGH. A complete right of abandonment certainly existed on the 11th of February, when the plaintiff's heard of the ship being detained. But they did not abandon; and their right to do so arising from the embargo merely,

merely, was gone. It is said, however, that a new state of things arose at the expiration of the season for sowing flax-seed in Ireland. Supposing a right of abandonment then to have revived, I am afraid it has not been exercised with sufficient promptitude. The sowing season ended on the 10th of May ; the abandonment was not made till the 11th of June ; and according to several decided cases, particularly the recent one of *Anderson v. The Royal Exchange Assurance Company*, this was out of time.

KELLY
v.
WALTON.

Verdict for the defendant.

The Attorney General, Park, and Scarlett for the plaintiffs.

Marryat for the defendant.

[Attorneys, *Alcock and Swain.*]

Vide Barker v. Blakes, 9 East 283.

JOSIAH BOYDELL v. DRUMMOND, Esq.

Sittings after
M. R. 1808.

THIS was an action for not accepting and paying for a set of prints from the plays of Shakespeare, according to the undertaking, into which it was alleged the defendant had entered by subscribing to the work.

or to have been in the habit of reading, one of the newspapers in which it appeared.

An advertisement published in several daily newspapers, is not evidence of notice to any individual who is not proved to have taken in,

Pleas,

BOYDELL

v.

DREW-
MOND.

Pleas, 1. *non assumpsit*. 2. *actio non accrebit infra
scv annos.*

In December 1786, the plaintiff and his late partner, Alderman John Boydell, circulated proposals for publishing by subscription a series of large prints from some of the scenes in Shakespear's plays, after pictures to be painted for that purpose: the prospectus stated that seventy-two scenes were to be published, at the rate of two to each play, and the whole were to be published in numbers, each containing four large prints, at the price of two guineas a number; that two guineas were to be paid at the time of subscribing, and on the delivery of each number, the remaining guinea for that was to be paid, together with two guineas in advance towards the succeeding number; that one number at least should be published annually after the delivery of the first, and that the proprietors were confident they should be able to produce two numbers within the course of every year. On the 7th of April 1790, after many of the pictures had been painted and exhibited in the Shakespeare gallery, the defendant became a subscriber, by signing his name in a book entitled, "*Shakespeare Subscribers, their signatures*," which contained a mere list of names without any reference to the prospectus or the conditions upon which the work was to be carried on. The first number was published in June 1791, and the second in March 1792. Both of these were delivered soon after publication to a person who called for them at the gallery in Pall Mall in the defendant's name, and paid for them, together with

with the sum in advance, according to the terms of the prospectus. One or two numbers were afterwards published annually; till the whole work was completed in 1803. Copies of the different numbers were regularly laid by for the defendant; but they were not called for, and he was never required individually to carry them away and pay for them till the year 1807.

BOYDELL
v.
DRUM-
MOND.

Various interesting points arose in the course of the trial; but there were two only upon which the Chief Justice gave his opinion so decisively at nisi prius as to authorize their being reported.

To obviate an objection, that from their having been no personal demand upon the plaintiff for near 20 years to take any one number of the work, and from his having taken none, the contract must be supposed to have been mutually abandoned, the plaintiff's counsel undertook to shew that the defendant had from time to time received regular notice, through the medium of a public advertisement, of the numbers being ready for delivery, and had been requested to send for them. For this purpose it was proposed to give in evidence certain advertisements addressed, "to the subscribers to the Shakespeare prints," which had been published in a newspaper called *The Oracle*.

Lord ELLENBOROUGH said, that before the advertisements could be received in evidence, it must be proved that the defendant was in the habit of reading the newspaper in which they appeared.

A witness then stated, that they had been inserted in almost all the daily papers, and that upon a similar

**BOYDELL v.
DRUMMOND.** a similar notice being given of the publication of the first two numbers, they had been carried away by some person in the name of the defendant.

The Attorney General contended, that under these circumstances, the advertisements were admissible evidence, and that the publication of this work being a matter of such general concern and notoriety, the defendant must be taken to have read the advertisements concerning it.

LORD ELLENBOROUGH. The responsibility of carriers is a subject of more general interest, and the only evidence admitted of notice to all who deal with them of any thing special in their contracts, is a board stuck up in their offices inscribed with large letters, communicating the intended information. I cannot admit the evidence offered, without holding an advertisement in the newspapers a general notice to all mankind.

The plaintiff not being prepared to shew, that the defendant was accustomed to read any newspaper in which the advertisements appeared, they were rejected (a).

If a cause of action arising from the breach of a contract to do an act at a specific time, is once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of the statute.

A question afterwards arose, whether the action was not barred by *the statute of limitations?* The plaintiff's counsel, (protesting, that as this was one continuing contract, the statute could not begin to operate till the work was completed) contended,

(a) *Vide Lord Gallwey v. Matthew, 10 East. 264.*

that

that even supposing it to have run as to each particular number from the time when that was published, still the case was completely taken out of the statute by an acknowledgment from the defendant, which revived the plaintiff's remedy.

BOYDELL
T.
DRUM-
MOND.

A letter from the defendant was accordingly given in evidence, which was dated 1st April 1807, and in which he says, "I ceased taking in the numbers of the Boydell Shakespeare many years ago, in consequence of the engagement not having been fulfilled on the part of the proprietors; and not having been applied to from that time till very lately, I do not consider myself called upon to complete the set."---It was likewise proved, that the defendant had lately observed, that "he had refused to take them in, because they did not answer his expectations."

The Attorney General insisted, that the defendant's letter and declaration took the case entirely out of the statute of limitations, as he had within six years acknowledged the existence of the contract, and that he had broken it. If a debt is claimed, and refused on a particular ground, the statute cannot afterwards be resorted to. If a man is asked to pay a sum of money which was due in 1798, and he says, "it is not due; I have paid you, as I will shew you by your receipt;" this would take the case out of the statute, and unless a receipt was produced, the money would be recoverable.(a) So here the defendant says, "I refused to take in

(a) *Vide Heyling v. Huskies*, 1 Salk. 29.—*Trueman v. Fent* &
Cowp. 548.—*Lawrence v. Worral*, Peak. N. P. Cas. 93.

BOYDELL ^{v.} the Boydell Shakespeare, because the engagement was not fulfilled on the part of the proprietors,—because the prints did not answer my expectations." Therefore this brought the case to the question, whether the engagement on the part of the proprietors had been fulfilled,—and whether the work was such as ought to have answered the reasonable expectations of the defendant.

Lord ELLENBOROUGH, without giving any decided opinion upon the general question, said, that the defendant's liability could not be affected by the letter or declaration. He has only acknowledged that he was guilty of a default ten or twelve years ago. How does this shew that the plaintiff has any cause of action which has accrued within six years? If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract. This is like the case of *criminal conversation*, where the defendant being accused, shortly before the commencement of the suit, of having seduced the plaintiff's wife, said, *he had not been guilty within six years*. That allowed that there was once a cause of action; but the statute was held to be a bar.

It was likewise debated, whether the contract did not require to be stamped? Whether it was not void by the 4th section of the statute of frauds, as being an agreement not to be performed within a year,

year, and not being evidenced by any note or memorandum in writing, signed by the party to be charged? And whether the defendant was not, at any rate, at liberty to withdraw from it when he chose, upon forfeiting two guineas?

BOYDELL
v.
DRUM-
MOND.

The plaintiff was at last nonsuited, with leave to move; and the court afterwards confirmed the nonsuit, on the *statute of frauds*, without giving any opinion as to the stamp, the statute of limitations, the abandonment, or the obligatory nature of the subscription.

Lord ELLENBOROUGH in the course of the argument adhered to his determination concerning the evidence of notice, and the other point as to the effect of the acknowledgment was not pressed *in banco*.

The Attorney General, Garrow, Marryat, and Bolland, for the plaintiff.

Park, Holroyd, and Dampier, for the defendant.

[Attorneys, Crowder and Fynemore.]

BOULTON and another v. DOBREE.

Sittings after
M. T. 1808.

THE first count of the declaration was upon a policy of insurance on the ship *Neutrality*, at and from Vera Cruz to London, with permission to

replication state that A. is resident in this country by the licence of our lord the King; to support an issue taken upon this fact, it is not enough for the plaintiff to prove that a licence was granted by our King to A. while an alien enemy to undertake a voyage to a foreign country, and from thence to England, which did not terminate till after the commencement of hostilities between his country and ours, and that after the termination of the voyage he went about at large here, without being molested by the English government.

If to a plea,
that A. for
whose benefit
the action is
brought, is an
alien enemy, the

BOULTON
v.
DOBBEL.

touch and take in goods at the Havannah. The interest was averred to be in Halvor Elieson.—The money counts followed.

Pleas, 1. The general issue to the whole declaration. 2. To the special count, that the promise therein mentioned was made to the plaintiff's as the agents of Halvor Elieson; that Halvor Elieson is a subject of the King of Denmark, between whom and our King there is an open war; "and that the said Halvor Elieson was and still is an enemy of our said Lord the now King, adhering to his enemies, and not resident within the dominions of our said Lord the now King under or by virtue of any letters of safe conduct or any licence or protection of our said Lord the now King."

Replication, "that the said Halvor Elieson before the commencement of the said action was, and from thence hitherto hath been, and still is resident within the dominions of our said Lord the now King, by the licence and under the protection of our said Lord the now King;"—concluding to the country.

The plaintiff's gave in evidence a licence, dated 29d January 1807, under the King's sign manual, mentioning by name the Danish ship Neutrality, Halvor Elieson master, and authorizing her upon certain conditions to undertake the voyage in question. It likewise appeared, that the ship being lost near the coast of Ireland, captain Elieson came to London about six months ago, and has resided here

here ever since, without any restraint whatever being put upon his person.

BOULTON
v.
DOBREK.

Lord ELLENBOROUGH. The plaintiff's are bound to shew that Elieson is resident in this country by the licence of our Lord the King. What do you tender as a licence for this purpose?

The Attorney General. The licence legalizing the voyage. That authorizes Halvor Elieson to go with his ship to an enemy's country, and to import a cargo from thence into Great Britain. It therefore operates as a licence to his residing here to manage the concerns necessarily growing out of the voyage. He has been proved to be resident within the dominions of our Lord the King, and he clearly is so "by the licence and under the protection of our said Lord the King." This is the issue.

Lord ELLENBOROUGH said, 'Elieson could not under these circumstances be considered as an alien enemy residing in this country with the King's licence. Although he went at large, it did not appear that government knew he was in the kingdom. To support the replication, it was necessary either to produce a protection granted to Elieson as an alien enemy, or to shew in some way, that his stay here had been sanctioned by the King after the commencement of hostilities with Denmark.'

The plaintiff was nonsuited, and the court of K. B. afterwards refused to set aside the nonsuit,

BOULTON *The Attorney General, Garrow, and Puller, for
v.
DOBREE.* the plaintiff.

Park, Marryat, and Carr, for the defendant.

* [Attorneys, Blunt and Gregg.]

Vide Kensington v. Inglis, 8 East, 273.

Sittings after
M. T. 1808.

**CROSBY and another, Assignees of BOUCHER,
a Bankrupt, v. CROUCH.**

If *A.* a shop-
keeper, procure
B. to discount
accommodation
bills drawn by
him and ac-
cepted by third
persons, and *B.*
afterwards re-
quire *A.* to give
him a collateral
security for the
payment of the
bills; upon
which *A.* se-
cretly deposits
with him a
quantity of
goods from his
shop, to be sold
for *B.*'s benefit
if the bills
should not be
paid; and soon
after, *A.* be-
comes bank-
rupt, and the
bills are dishonoured: the
depositing of
the goods in
this manner as a security, cannot be invalidated as a voluntary preference in contemplation of bankruptcy.

TROVER for books and stationary.

The bankrupt, who was a bookseller, in September 1807 applied to the defendant a pawnbroker, to discount three bills for him for £. 50. each, which he had drawn upon two persons of the names of *Jones* and *Young*.

The defendant gave him cash for them; but soon after, becoming suspicious of the bankrupt's credit, he asked him, whether they were not accommodation bills. The bankrupt answered, that they were. The defendant then required some security to be put into his hands, in case the bills should not be paid when they became due. In consequence of this application, the bankrupt at different times between November and February, deposited with the goods in

the

the defendant various parcels of books to the value of about £. 300, for the purpose of being sold for his benefit if the bills should not be duly honoured by the acceptors. These books were chiefly brought by the bankrupt in a hackney coach in the evening. It likewise appeared, that he had compounded with his creditors two or three years before, which circumstance must have been known to the defendant, who had assisted him to pay the stipulated composition. *Boucher* committed an act of bankruptcy in the beginning of March, and the commission was sued out against him on the 17th of that month. The bills still remain in the defendant's hands unsatisfied.

CROSBY
v.
CROUCH.

It was contended on the part of the plaintiffs, that the defendant had unduly obtained possession of the books by a voluntary preference in contemplation of bankruptcy;

Lord ELLENBOROUGH. How is this a case of voluntary preference? The bankrupt parted with the books upon the defendant's importunity. The bills were not due, but the bankrupt was liable upon them, and the defendant had a right to ask for farther security.

The Attorney General for the plaintiffs. This security was given fraudulently. The defendant knew that the bankrupt had lately compounded with his creditors; and the manner in which the books were conveyed shows the sense which both parties entertained of the transaction. No security was

CROSBY
v.
CROUCH.

taken when the bills were discounted, and the defendant could not demand any before they were due. Till then he had no right of suit. The principle upon which the demand of a debt actually due prevents payment, or the giving of security, from being deemed a fraudulent preference is, that by means of legal process, the creditor has it in his power instantly to arrest the debtor to compel satisfaction. Here the debt was not due, and was only contingent. No such proceeding, therefore, was open to the defendant. His threats, if he used any, were *brutum fulmen*. It follows, that the preference shewn him by the bankrupt, was voluntary, fraudulent, and void.

Lord ELLENBOROUGH. The defendant had not a right of action when the books were deposited with him; but the bills constituted a good petitioning creditor's debt, and might have afforded him the means of compulsion. Strictly, only the acts of a trader subsequent to his bankruptcy are void. Precedent acts supposed to be in contemplation of bankruptcy have likewise been invalidated; but this is an excrescence upon the bankrupt laws. The cases upon the subject have gone far and far enough, and I am not disposed to give them any extension. If the debt had been due here, the preference certainly would not have been fraudulent. It wants *voluntariness*, in which the fraud consists. The consideration upon which a payment made to an importunate creditor of a debt actually due has been allowed to be valid, has not been, that he might resort to a suit to enforce payment, but that his

his demand repels the presumption that the bankrupt, upon the eve of bankruptcy, made a distinction among his creditors, and spontaneously favoured one of them to the prejudice of the rest. A demand of farther security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone, transactions previous to the bankruptcy can be set aside.

CROSBY
v.
CROUCH.

The plaintiffs were nonsuited; and the cause being afterwards brought before the court of K. B. the Judges were unanimously of opinion, that the nonsuit should stand.

The Attorney General, Garrow and Lawes, for the plaintiffs.

Park and Marryat for the defendant.

[Attorneys, *Watkins and Cockayne*.]

Vide Thompson *v.* Freeman, 1 T. R. 155.—Hartshorn *v.* Sloden, 2 Bos. & Pul. 582.—Bayley *v.* Ballard, 1 Campb. 416.

COURT OF COMMON PLEAS.

1809.

ADJOURNED Sittings IN LONDON AFTER
EASTER TERM, 49 Geo. III.

FRAZER v. HOPKINS and LONG.

To prove that A. is liable as registered owner of a ship, entries in the custom house books of the port of London and of the out-port to which the ship belongs, stating that she was transferred to B. by C. the original owner, are not sufficient evidence.

THIS was an action for repairs done to a ship.

The plaintiff sought to charge the defendants as the registered owners (*a*). To prove that they were such at the time when the cause of action accrued,--

Mr. Sentence, from the custom house in the port of London, was called. He produced a book kept at the custom house, which contained an account of the registers and transfers of ships belonging to the outports; and from this he read an entry, stating that on such a day, the ship in question, which had been originally registered at *Harwich* in the names of *Hearne* and *Sprankling*, was transferred by them to the defendants, *Hopkins* and *Long*; who appeared to continue the registered owners. He said that this entry had been made in the usual

(*a*) *Vide Rich v. Coe*, Cwp. 636.—*Westerdell v. Dale*, 7 T. R. 306.—*Young v. Brander*, 8 East, 10.

form,

form, in consequence of a letter from the custom house at Harwich, announcing that an entry had been made there to that effect.

1809.
FRAZER
v.
HOPKINS.

A clerk from the custom house at Harwich was afterwards called, and produced the *register book* kept there, in which the entry above alluded to appeared: but the plaintiff neither put in the original certificate of registry indorsed as directed by 7 & 8 W. 3. c. 22. s. 21. 26 G. 3. c. 60. s. 16. and 34 G. 3. c. 68. s. 15. nor a register *de novo* under 34 G. 3. c. 68. s. 21. nor offered evidence of any oath taken or act done by either of the defendants as owners of the vessel.

Shepherd, Serjeant, contended that these entries were insufficient to prove that the property in the ship had been transferred to the defendants, and still less to charge them as owners. It was clearly necessary to produce some instrument concerning the transfer to which they were parties, or to shew that they had done something to acknowledge themselves to be owners of the ship; otherwise, an entry of this sort might be made without the privity of the supposed purchaser, and a man who had never any thing to do with shipping in his life, might be rendered liable for the repairs of half the ships in the river Thames.

Best, Serjeant, *contra*, insisted that the defendants were bound by these entries in the custom house books, and if the entries were false, that they must take their remedy against the officers who made them. The entries were acts of office to which credit

1809.
FRAZER
v.
HOPKINS.

credit must be given. The presumption was in favour of the regularity of such entries, and the court must suppose that they were warranted by a register de novo, or an indorsement made upon the old one, with all the requisite forms. After a positive statement of the transfer in the books of the custom house, we must presume *omnia rite acta*. One great object of the register acts was, to enable the public to ascertain who are the real owners of ships. The books produced are kept for that purpose. But they would only mislead and do mischief, if it could be said to a man who had repaired a vessel upon the faith of the ostensibly registered owners being responsible persons, that they have nothing to do with her, and that he must hunt after the secret owner, who when found may be a bankrupt.

Sir JAMES MANSFIELD, C. J. These defendants may be the legal owners of this ship; but I think you have not proved that they are. The custom house books by themselves cannot be sufficient to charge the defendants, unless they are made evidence for this purpose by act of parliament. There is no proof to connect *Hopkins* or *Long* with the entry relied upon; and for aught that appears, they were ignorant of its existence till it was produced in court. Perhaps the oath taken by them upon the transfer would be sufficient, but at present you have established no connection between them and the property in the ship in question. And unless a clause in an act of parliament or a decided case is adduced in support of this evidence, I must order the plaintiff to be called. It

It was agreed that the plaintiff should be nonsuited, with liberty to move to enter a verdict for £. 157.

1809.
FRAZER
v.
HOPKINS.

Accordingly, a motion for this purpose was made the ensuing term; but the court of C. P. refused a rule to shew cause.

Best, Vaughan, Serjeants, and Espinasse for the plaintiff.

Shepherd and Lens, Serjeants, for the defendants.

Upon the principle that the assignee of a term is not hable, unless he assent to the transfer. Q. How far this will be presumed, on production of an official instrument which could not regularly be obtained without the oath of the person sought to be charged as owner?

Vide Camden v. Anderson, 5 T. R. 709.—Westerdell v. Dale, 7 T. R. 366.—Young v. Brander, 8 East, 10.

CASES

ARGUED AND DECIDED AT¹

N I S I P R I U S IN K. B.

*At the Sittings in Trinity Term,
49 GEORGE III.*

FIRST Sittings at WESTMINSTER.

1809.

MONPRIVATT v. SMITH and another, Sheriff
of Middlesex.

Wednesday,
June 7.

TRESPASS for breaking and entering the plaintiff's house, staying therein three weeks, and seizing and carrying away his goods.

Pleas, 1. Not guilty to the whole. 2. As to breaking and entering the house, and staying therein *twenty-four hours, part of the said time in the said declaration mentioned*, and also as to seizing and carrying away the goods, a justification under a writ of *fieri facias*.--Replication to last plea, admitting the writ, *de injuria sua propria absque residuo causæ*.

To trespass for breaking and entering a house and staying therein three weeks, the defendant pleads a justification as to breaking and entering and staying in the house 24 hours. The plea covers the whole declaration.

The

1809.

MOYERI-

v.

SMITH.

The defendants proved their justification ; but it appeared, that their officers continued in the plaintiff's house *beyond twenty-four hours.*

Garrow and *Wigley* for the plaintiff, contended, that the excess beyond twenty-four hours stood merely upon the plea of *not guilty*, and as the defendants had been proved to have been guilty of remaining in the house longer than they pretended to justify, the plaintiff was entitled to a verdict and damages for what he had thereby suffered.

Lord ELLENBOROUGH. I am of opinion, that the last plea, in point of law, applies to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment. As the pleadings now stand, *the residue of the cause* mentioned in the plea is alone put in issue, and the length of time during which the officers remained in the house is rendered immaterial.

The plaintiff was nonsuited.

Garrow and *Wigley* for the plaintiff.

Park, *Marryat*, and *Laws*, for the defendants.

In trespass for breaking and entering the plaintiff's house and expelling him therefrom, the expulsion is merely aggravation, and a justification as to breaking and entering will cover

the whole declaration. *Taylor v. Cole*, 3 T. R. 292.—1 H. Bl. 555, S. C. So in trespass for taking goods and converting them to the defendant's use, it is enough to justify the taking, and

and if the plaintiff means to rely upon the conversion, he is driven to a new assignment, *Dye v. Leatherdale*, 3 Wils. 20. *Fisherwood v. Cannon*, 3 T. R. 297. And in trespass for impounding cattle and keeping them so close that they died, a plea justifying the impounding of the cattle is *prima facie* a complete defence to the action. *Gates v. Bayley*, 2 Wils. 313. It seems to be a general principle, that where the defendant answers what may

reasonably be considered the *gist* of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment, that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning. *Vide Cheasley v. Barnes*, 10 East, 73.

1809.
MONPRI-
VATT
v.
SMITH.

FIRST SITTINGS IN LONDON.

STEWART v. KENNEDD.

Thursday,
June 8.

ACTION against the defendant as indorser of a bill of exchange.

The only question was, whether the defendant had received due notice of the bill being dishonoured for non payment?

Notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorized by him.

To prove this, a witness of the name of *Cutler* was called, who swore, that he had been employed by the original parties to the bill to get it discounted; that when it became due, it was in the hands of one *Abbott*, to whom the plaintiff had indorsed it; that the day after, the witness met the defendant, and told him it had not been paid;

1809.

SIEWART
..
KLNNLTT.

that the defendant asked who held it, and that the witness answered, *it lies at Messrs. Bonds', Abbott's bankers.* *

Park for the defendant, objected that this was insufficient; that knowledge is not notice, and that the intimation of the dishonour of the bill must come from the holder of it.

Garraway, contra, contended, that the notice given by Cutler, not only possessed the defendant of the same information, but placed him in the same situation, as if it had come directly from the indorsee. What was there to hinder him from immediately taking up the bill and resorting to the acceptor, the drawer, or prior indorsees? Besides, Cutler having been employed to get the bill discounted, might well be considered as an authorized agent to give the notice, and even if he had no original authority to give the notice, the plaintiff adopted it by bringing this action.

Lord ELLENBOROUGH. If you could make Cutler the agent of the holder of the bill, the notice would be sufficient; but in reality he was a mere stranger. The bill when dishonoured, lay at the bankers of Abbott, with whom Cutler had no sort of connection. But the notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise it is merely an historical fact. In this case, Cutler was not possessed of the bill, and had no controul over it. The defendant therefore is not proved to have had any legal notice of the dishonour of the bill, and is discharged

discharged from the liability he contracted by indorsing it. 1809.

SIEWARD
v.
KENNETT.

Plaintiff nonsuited.

Garrow and *Wigley* for the plaintiff.

Park and *Lawes* for the defendant.

Vide *Esdale v. Sowerby*, 11 East, 114.

WITHALL v. MASTERMAN and others.

Thursday,
June 6

MONEY had and received. Plea, the general issue.

The defendants were the plaintiff's bankers, and this action was brought to try whether they were bound to give him credit in account for a sum of £. 345. 7s. 10d.

The holder of a bill of exchange, on its becoming due, allows the acceptor to renew it, without consulting the indorser, but the indorser afterwards says to the acceptor, it is the best thing, that could be done. This is not a recognition of the terms granted by the holder to the acceptor, and the indorser is discharged.

He had indorsed to them a bill of exchange for this amount, accepted by one *Ross*. When the bill became due *Ross* was unable to pay it, and they took from him, without previously consulting the plaintiff, another bill on one *Etherington*, which was never satisfied. A week after, *Ross* met the defendant, and told him he had taken up his acceptance by another bill, when the defendant approved of it, and said, *it was the best thing that could be done.*

1809.
WITH ALL
MASTER-
MAN.

Garrow for the defendants insisted, that this ratification was equivalent to a previous authority, and that the plaintiff must be taken to have consented to the substitution.

Lord ELLENBOROUGH.—This is a very hard case, and I should be glad if any sufficient authority or recognition could be proved. But the plaintiff does not appear to have recognized the act of the defendants. His approbation of what had been done must refer to the acceptor of the bill, to whom it was evidently advantageous. The holders had no right to make terms with the acceptor, and by so doing they discharged the indorser. They were therefore bound to give him credit in account for the amount of the bill.

Verdict for the plaintiff.

Park and *Reader* for the plaintiff.

Garrow and *Marryat* for the defendants.

But if the holder of a bill of exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answers, "You may do as you like, for I am discharged for want of notice,"

and it appear that due notice was given, the holder may still sue the drawer after taking security from the acceptor.—*Clark v. Delvin*, 3 Bos. & Pul. 363.—*Vide etiam Tindal v. Brown*, 1 T. R. 167.—*English v. Darley*, 2 Bos. & Pul. 61.

SECOND SITTINGS AT WESTMINSTER.

1809.

POCOCK v. EUSTACE.

Monday,
June 12.

THIS was an action for use and occupation, in which the rent the plaintiff sought to recover was clearly proved to be in arrear.

Wigley for the defendant contended, that the property tax ought to be deducted from the amount of the rent, as the tenant was liable for this in the first instance, and the landlord was bound under a penalty to allow the deduction ~~on~~ demand. Therefore the real sum due was, the residue of the rent after the property tax was deducted, and for so much only ought the verdict to pass.

Lord ELLENBOROUGH.—It would be impossible for the business of the court to be transacted if we were to enter into these calculations at *misi prius*. In such an action as this, the plaintiff must recover the amount of the rent in arrear, and the parties must settle out of court the deductions to which the tenant is entitled. It is only on the production of a certificate of the tax being paid, that the landlord is bound to make the allowance, and their respective rights upon this subject cannot be determined without a laborious consideration of the property.

In an action for use and occupation, the property tax will not be deducted at *misi prius* from the rent due.

1809. property-tax acts, which are not remarkable either for brevity or perspicuity.

Pocock. *Estate.* Verdict for the rent in arrear.

Garraway and Reader for the plaintiff.

Higky for the defendant.

[*Attorneys, Inlett and Adams.*]

SECOND Sittings in LONDON

Thursday,
June 15.

CRITCHLOW v. PARRY.

In an action against the indorser of a bill of exchange, it is not necessary to prove any endorsements on the bill prior to the date of it.

ACTION by the indorsee against the indorser of a bill of exchange.

The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff.

A question arose, whether upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers.

Lord ELLENBOROUGH at first doubted, whether it was not necessary in this case as well as in an action against the acceptor, to prove all the indorsements that were mentioned in the declaration, and particularly that of the original payee.

Clarke.

Clarke for the plaintiff contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged, he would be liable; that he was to be considered as the drawer of a new bill of exchange; and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom therefore, a title through the payee must be established.

Lord ELLENBOROUGH was of this opinion, and the plaintiff had a verdict.

The action was undefended.

[Attorneys, Windle and Cooper.]

So in an action against the indorser of a bill, the hand-writing of the drawer need not be proved. *Lambert v. Pack*, 1 Salk. 127. *Lambert v. Oakes*, S. C. 1 Lord Raym. 443. But in an action by an indorsee against the drawer, the indorsement of the payee must be proved, although the bill with the indorsement upon it was shewn to

the defendant after it was due, and he did not then object to the title of the holder. *Duncan v. Scott*, 1 Campb. 101. And in an action against the acceptor, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. *Smith v. Chester*, 1 T. R. 654.

[It may be useful to subjoin the following note here, although the case did not occur till the sittings after term.]

Sittings after
T. T. 49 G. III.

WILLOCK assignee of **WESTMACOTT**, a bankrupt, v. **SMITH**.

In actions by assignees of bankrupt, to which the general issue was pleaded before the passing of Sir Samuel Romily's act, 49 Geo. III. c. 131. it is unnecessary for the plaintiff to prove the trading, act of bankruptcy, or petitioning creditor's debt : but, under these circumstances, a judge would give the defendant leave to withdraw his plea, and plead it *de novo* with the notice described in the 10th sect. of the above statute.

INDEBITATUS assumpsit for work and labour, &c. Plea, *the general issue*, which had been pleaded before the passing of Sir Samuel Romily's act, 49 Geo. III. cap. 131.

It was contended, that as the defendant had no opportunity to give the notice pointed out by the 10th sect. of that statute, this case did not come within its provisions, and the plaintiff was still bound to prove the trading, act of bankruptcy, and petitioning creditor's debt.

Lord **ELLENBOROUGH**. The statute says, that in any action *brought or to be brought* by any assignee of a bankrupt, the proceedings under the commission shall be evidence of the petitioning creditor's debt, and of the trading and bankruptcy, unless the defendant before; or at the time of his pleading, give notice that he means to dispute these matters, or any of them. Therefore, where no such notice is given, the proceedings under the commission must be sufficient. If the defendant had wished to contest the validity of this commission, he might have obtained leave, by a judge's order, to withdraw his plea, and plead it again with a notice suitable to his case ; but as he has not done so, I must presume that he comes here only to deny the existence of the debt demanded.

Park and Espinasse for the plaintiff.

Carrow for the defendant.

This note was cited in **Clarkson v. Dadds**, C.P. Sittings after T. T. *C. Cor.*
MANSFIELD C.J. who recognized and acted upon the decision.

Errat. Some mistakes have occurred as to the order in which the cases of Easter Term are arranged. Those from p. 117. to p. 149. were tried at Westminster, and those which follow, in London.

CASES

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B.

At the Sittings after Trinity Term,

49 GEORGE III.

FIRST SITTINGS AFTER TERM IN LONDON.

LAXTON v. PEAT.

1809.

Friday, June 23.

ACTION by the indorsee against the acceptor of a bill of exchange.

The bill was drawn by one *Hunt*, and accepted for his accommodation by the defendant. The plaintiff gave value for it; but had notice of the circumstances of its original formation. When it became due, he received part payment from *Hunt*, and gave him time to pay the remainder, without the concurrence of the defendant.

If the indorsee of a bill of exchange, having notice that it was accepted without consideration, receive part payment from the drawer and give him time to pay the residue, he thereby discharges the acceptor.

N. G. Clarke for the plaintiff contended, that the defendant was still liable for such part of the sum

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O

mentioned

1809.

LAXTON

v.

PEAT.

mentioned in the bill as remained unpaid. Although the drawer might be discharged by the holder's giving time to the acceptor, it had been decided that nothing would discharge the acceptor but satisfaction of the bill or an absolute renunciation of all claim upon him in respect of it (*a*).

Lord ELLENBOROUGH.—This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer, and in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal (*b*). The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant, and accepted by *Hunt* in consideration of a debt due. According to many authorities, the defendant, upon that supposition, would have been discharged, by the time given to *Hunt*; and the principle of these authorities applies with equal strength to the facts actually given in evidence.

(*a*) *Dingwall v. Dunster*,
Dong. 247.

(*b*) *Rees v. Beirington*, 2 Ves. Jun. 540. *Clark v. Devlin*, 3 Bos. & Pul. 366. But in an action on an indemnity bond

against a surety, the laches of the obligee is no ground of defence at law. *Trent Navigation Company v. Harley*, 10 East, 34.

Plaintiff nonsuited (*a*).

1809.

N. G. Clarke and _____ for the plaintiff.

LXXXV
PEACE

Garrow for the defendant.

[Attorneys, *Fisher and Rogers.*]

(*a*) *Vide Ellis v. Galindo, Doug. 250. n. English v. Darley, 2 Bos. & Pul. 61. Ex parte Smith, Co. B. L. 168. Ed. 5.* There is a good deal of contradiction and confusion in the books upon the question, which of the two, the drawer or acceptor of a bill of exchange, is to be considered the principal debtor, and which the surety. The old cases, looking to the consideration which passes from the payee to the drawer, treat the acceptor as a stranger, only collaterally liable; but in mo-

dern times the courts seem to be more influenced by the peculiar nature of the contract created by a bill of exchange; and as the drawer cannot be resorted to till the acceptor has made default, in analogical reasonings concerning their respective rights and liabilities, the latter is now generally pointed out as the principal and the former as the surety.

Q. Whether it would now be held, that debt will not lie against the acceptor of a bill of exchange? *Bishop v. Young, 2 Bos. & Pul. 78.*

v

ADJOURNED Sittings at WESTMINSTER.

1809.

Tuesday,
June 27.

In an action
against the
drawer of a
foreign bill of
exchange, a pro-
mise of payment
by the defendant
after the bill was
due, is sufficient
evidence of a
protest for non-
payment, and
notice of the
dishonour of the
bill.

GIBBON v. COGGON, Esq. Sheriff of Essex.

THIS was an action against the sheriff of Essex for not arresting one *Joseph Colbourne* on mesne process at the plaintiff's suit.

The plaintiff's counsel opened, that *Colbourne* was liable to be held to bail as drawer of a foreign bill of exchange indorsed to the plaintiff. To prove that *Colbourne*, who was an officer in the army, had received notice of the dishonour of the bill, the evidence was, that after it had become due, he was told it was dishonoured, and called upon to pay it; when he said, *that his affairs were at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agent were cleared.*

Park for the defendant contended, that the same evidence should be given here as in an action against *Colbourne*, and that to charge him as a drawer of a foreign bill of exchange, a protest must be produced as the only regular notice of the bill's being dishonoured.

Lord

Lord ELLENBOROUGH—By *Colbourne's* promise to pay, he admits his liability; he admits the existence of every thing which is necessary to render him liable. When called upon for payment of the bill, he ought to have objected, that there was no protest. Instead of that, he promises to pay it. I must, therefore, presume that he had due notice, and that a protest was regularly drawn up by a notary (*a*).

1809
Gibson v.
Coggan.

It was then proved that after the delivery of the writ to the Sheriff, and until its return, *Colbourne* was in the county of Essex, and that notice of this fact had been given to Mr. *Cutting*, who is agent for the under-sheriff in London.—But

In an action against the sheriff for not arresting a person on notice process, notice of this person being within the defendant's bailiwick, given to the under-sheriff's agent in town, is no evidence of such notice to the defendant.

Lord ELLENBOROUGH held that the plaintiff was bound to go farther, and prove notice to the under-sheriff in the country, or to the bailiff to whom the warrant was directed. Mr. *Cutting* could not be considered the agent of the sheriff for the purpose of receiving such notice. His functions were of a perfectly different sort. Suppose the case of a *capias* into Northumberland, could the under-sheriff's agent in London have any concern with the manner of executing it? But the present case must be governed by the same rule.

(a) *Vide Legge v. Thorpe*, December 11, 1809, postea.

1809.

GIBSON
v.
COGGON.

Plaintiff nonsuited.

Garrow and Curwood for the Plaintiff.*Park and Marryat* for the defendant.

(Attorneys, Duff and Cutting.)

Tuesday,
June 27.

TOWNSEND AND ANOTHER v. NEALE, Esq.

*Windsor Herald
and Blue Mantle
Poursuivant at
Arms may main-
tain a joint ac-
tion for work
and labour in
making out a
pedigree, both
having been on
duty when the
order for it was
given, although
only one of
them was ap-
plied to by the
defendant.*

THIS was an action by *Windsor Herald* and *Blue Mantle Poursuivant at Arms*, for work and labour in making out the defendant's pedigree.

It appeared that the defendant applied only to Mr. Townsend, Windsor Herald; but that at the time when the application was made, both the plaintiffs were in attendance, and that by the usage of the Herald's Office, a Herald and Poursuivant are always in attendance, who share the profits of any business which is begun while they are jointly on duty, although it should not be finished till long after.

It was objected that the defendant could not be affected by any secret regulation among the members of the Herald's College, and that if liable at all he could only be liable to the person with whom he had contracted.—But

Lord

Lord ELLENBOROUGH held that the plaintiffs were in the situation of co-partners, and might maintain a joint action for money to which they were jointly entitled.

1809
TOWNSEND
and another
v.
NEALE.

The defendant likewise objected that the pedigree was fabulous, which represented him as lineally descended from WILLIAM THE CONQUEROR, EDMUND IRONSIDE, Llewellyn, Prince of Wales, RODRICK, King of Ireland, Fulke, King of Jerusalem, and CADWALLADER THE GREAT, King of Britain; besides being allied to most of the reigning houses now in Europe.

In such an action the plaintiffs are bound to give general evidence of the pedigree being true, unless this has been dispensed with by the defendant.

It was proved, however, that he had ordered his descent to be traced through all the direct and collateral branches; and that a sketch of the pedigree, with references to the books in the office, had been delivered to him, which he did not object to, but refused to return. Several persons from the Herald's Office swore that they never made out any fictitious pedigree, and that they had documents and proofs for all the 426 descents in the one in question.

Lord ELLENBOROUGH said, that as a fictitious pedigree could be of no use to the defendant, he would not be liable if this furnished to him were of that description. In common cases of this sort, the plaintiffs would be bound to give some general evidence of the truth of the pedigree; but here a sketch, with

v. 1809.

To. v.
and another
v.
NEALE.

references to the original documents, had been delivered to the defendant, with which he seemed satisfied, and by refusing to deliver it back, he had prevented the plaintiffs from verifying it. Upon the whole, the plaintiffs were entitled to recover, if the jury should believe that the pedigree was fairly compiled from authentic materials according to the laws of heraldry.

The plaintiffs had a verdict.

The *Attorney General* and *Scarlett* for the plaintiffs.

Garraway for the defendant.

[*Attorneys, Hanrott and Maddocks.*]

"Temp. II. 3. fuerunt in Anglia Reges heraldorum Heraldi, et Persuandi. Reges toti Anglia duo tantum, ab antiquo, —unus Australium partum vis Trentum, alter Boraculum trans Trentum. Ha Norroy, ille Clarencieux nominatus. Garter nullus donatus provinciis in primum locum ab II. 5. fuit superinductus. R. 3. 1. Regni primus heraldos incorporavit." Spelm. Gloss. Herad. But Philip & Mary, in the third year

of their reign, granted a new charter to the College of Heralds, whereby, "Carter, Rex Armorum, Clarencieux, Rex Arum partium Australium, Norroy, Rex Arum partium Boraculum, 6 heraldi inferiores, Windsor, York, Chester, Richmond, Somerset, Lancaster, et omnes prosecutores sive persuandi armorum sunt incorporati. 4 Inst. 126. Com. Dig. tit. Norroy (A),

1809.

WOODFORD v. ASHLEY.

Wednesday,
June 28,

THIS was an action for a malicious prosecution.

The declaration after stating that the defendant, on the 3d day of June 1808, indicted Mary, the plaintiff's wife, in the court of King's Bench, for an assault alleged, that the defendant prosecuted the said indictment, "until the said Mary afterwards, to wit, on "Wednesday next after 15 days of Easter, in the 49th "year of the reign, &c. in the court of our said Lord "the King, before the King himself at Westminster, " &c. before the Right Hon. Edward Lord Ellenbor- "rough, Chief Justice, &c. William Jones, Gent. " being associated with the said Edward Lord Ellen- "borough, according to the form of the statute, &c. " was in due manner and according to the due course "of law, by a jury of the said county of Middlesex, " acquitted of the premises in the said indictment "specified and charged upon her, and the said Mary "was discharged thereupon by the said court."

In an action for a malicious prosecution, an allegation in the declamation, that the person prosecuted was acquitted by a jury in the court of our lord the King, before the King himself at Westminster, before the Chief Justice, is not supported by a record, from which it appears that the trial took place before the Chief Justice at Nisi Prius.

A copy of the record of acquittal was given in evidence, which was drawn up exactly in the usual form, and from which it appeared that the trial took place before Lord Ellenborough at Nisi Prius *on Tuesday next after the end of Hilary Term at Westminster, in the county of Middlesex in the Great Hall of Pleas there,* and that, on Wednesday next after 15 days of Easter (*the return of the habeas corpora*) the said Mary was adjudged

Woodford v. Ashley. adjudged by the court of our lord the king before the king himself, *to depart without day in that behalf.*

The *Attorney-General* submitted that there was a fatal variance between the declaration and the record of acquittal; as the trial was alleged to have taken place on Wednesday next after 15 days from the feast day of Easter, whereas it was proved to have taken place on Tuesday after the end of Hilary Term; and there was a clear misdescription of the tribunal before which the verdict of acquittal was given, the declaration stating that to have been "the court of our said lord the king before the king himself," (which must be a trial at bar) and the record proving it to have been in the great hall of pleas at Westminster before Edward Lord Ellenborough, Chief Justice, &c. William Jones, Gent. being associated, &c. (which was a trial at Nisi Prius.).

Garraw, for the plaintiff, maintained, that upon the authority of Purcell *v. McNamara*, 9 East. 157. the variance as to time was immaterial; and the court at Nisi Prius, though not commonly so described, might without impropriety, be stiled the court of our lord the king before the king himself.

Lord ELLENBOROUGH.—This is not the court of our lord the king, before the king himself, but a sitting at Nisi Prius in the great hall of pleas at Westminster. What is decisive is, that the declaration goes

goes on to say, that the said Mary was thereupon discharged by the *said* court. She was not both tried and finally discharged at the same time, nor by the same tribunal. The mistake has arisen from supposing that both occurrences took place together at the return of the *habeas corpora*. But the Chief Justice is then supposed to return his record, which shews that the trial took place at the day of Nisi Prius.—His Lordship refused to save the point, and directed a nonsuit.

1809.
Woodford
v.
ASHLEY.

In the ensuing term *Puller* moved for a rule to shew cause why the nonsuit should not be set aside, contending that the variance was immaterial, and that as the declaration contained a sufficient averment of the acquittal according to the fact, the incongruous matter might be rejected as surplusage; but THE COURT held that there was a substantial misdescription of the tribunals before which the plaintiff's wife was tried and finally acquitted, and *Puller* took nothing by his motion.

Garow, Topping, and Puller, for the plaintiff.

The *Attorney-General* for the defendant.

[Attorneys, *Vincent and Johnson*.]

Vide Hunter v. French, Willes, 517. Rex v. Lookup, 1 T. R. 210. Morgan v. Hughes, 2 T. R. 231.

SABIN

1809.

Saturday, July 1.

SABIN v. DE BURGH and others.

A notice to magistrates under §. c. 2. c. 12.
need not specify
the *for* *action*
to be brought.
It is sufficient
if it states
the *value* or
process, and the
cause of action.

THIS was an action for false imprisonment against three magistrates of the county of Middlesex.

A notice, of which the following is a copy was proved to have been served upon each of the defendants :

"Sirs,

YOU having on or about 17th day of October last, as three of His Majesty's justices of the peace in and for the county of Middlesex, caused me to be apprehended and unlawfully confined in a certain gaol or prison commonly called the Cage, at Uxbridge, in the said county, and to be there imprisoned, and kept and detained in prison there without any lawful, reasonable, or probable cause whatsoever, for a long space of time, (to wit,) for the space of three hours then next following, and at the expiration of the said confinement and imprisonment, caused and procured me to be removed from the said Cage at Uxbridge, and unlawfully carried and conveyed hand-cuffed in and on board of a certain vessel called the Enterprize Tender, then lying in the River Thames, and without any reasonable or probable cause whatsoever, caused and procured me to be kept and confined in and on board of such tender for a long space of time, (to wit) for the space of three weeks then next following; I do, therefore

therefore according to the form of the statute in such case made and provided, hereby give you notice that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a certain precept, commonly called a bill of Middlesex, to be sued out of His Majesty's court of King's Bench at Westminster against you at my suit, for the said imprisonment, and shall proceed against you thereupon according to law. Dated this 28th day of December, 1808.

1809.
SABIN
v.
Dr BURCH
and others.

Yours, &c.

Witness, &c.

JAMES SABIN."

Garrow for the defendants objected, that this notice was insufficient under stat. 24 G. 2. c. 44. (a), in not stating what action the plaintiff meant to found upon his bill of Middlesex. After suing out that, he might have declared in *cave*, or in *trespass*, and it was mate-

(a) Stat. 24. Geo. 2. c. 44. § 1. enacts, "that no writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any Justice of Peace, for any thing by him done in the execution of his office, until notice in writing of such intended writ or process shall have been delivered to him, or left at the usual

place of his abode, by the attorney or agent of the person who intends to sue, at least one calendar month, before the suing out or serving the same, in which notice shall be clearly and explicitly contained the *cause of action*; on the back of which notice shall be indorsed the name of such attorney, with the place of his abode."

rial

1809.

**SABIN v.
DE BURGH
and others.**

trial that the magistrates should be informed which was to be brought against them, as that might guide their discretion in tendering amends. One of the objections in *Lovelace v. Curry*, 7 T. R. 631. was, that the notice did not state *what form of action the plaintiff meant to commence*, and it might be gathered from what fell from the court, that this objection was fatal.

Lord ELLFBOROUGH.—All that the statute requires is, that the notice shall contain two things, 1. the writ or process which the plaintiff intends to sue out; 2. the cause of action for which he sues. Both these are contained in the present notice. The form of action is not required to be specified. In *Lovelace v. Curry*, the court only decided, that there must be a month's notice of the particular process to be sued out, and that it was not enough to say, that an action should be commenced against the magistrate *for his said misconduct*. I do not disapprove of anything laid down in that case; but I am not disposed to carry it farther, lest actions of this sort should be entirely defeated.

The attorney whose name was indorsed on this notice, and who had served it, being asked if at that time he had taken out his certificate, said, he had ordered his clerk to take it out, and had given him money for this purpose; but that he had never seen it.—Lord *Ellenborough* held this sufficient evidence of his being qualified to act as an attorney..

It was proved that the defendants having convicted the plaintiff, a farmer's son, of riding on the shafts of his cart, whereby he forfeited 10s. sent him on board the tender at the Tower, and that he was transmitted from thence to a ship of war at the Nore, where he remained till discharged under a writ of habeas corpus.

1809.
SABIX
c.
De BURGH
and others.

The plaintiff had a verdict with 500*l.* damages.

Park and Reader for the plaintiff.

Garrow, Espinasse, and Arabin for the defendants.

[*Attorneys, Coleman and Wortham,*] *

But the plaintiff cannot give notice of one form of action and declare in another. *Strickland v. Ward*, 7 T. R. 631. n. It is now settled, that where a magistrate intends to act as such, in a matter within his jurisdiction, however mistaken he may be, he is entitled to notice under this statute. *Waller v. Tokie*, 9 East, 364. It is sufficient for the attorney who gives the no-

tice to describe himself generally of the town in which he resides, as "of Birmingham." *Osborn v. Gough*. 3 Bos. & Pul. 551. But it must appear from the words used, that the place at which the notice is dated is the place of the attorney's abode. "Given under my hand at D." held bad. *Taylor v. Fenwick*, 7 T. R. 635.

WRIGHT

1809.

Monday,
July 3.

In an action for the value of goods furnished on the defendant's credit to a third person, that person is not a competent witness for the plaintiff, without a release.

Q. If this person be a married woman living apart from her husband, whether she must be released to render her a competent witness?

WRIGHT v. WARDLE, Esq. M. P.

THIS was an action by an upholsterer for the price of certain household furniture, supplied to one Mrs. Mary Ann Clarke, at the request and on the credit of the defendant.

To prove that the credit had been given to the defendant, the principal witness was Mrs. Clarke herself.

Best, Serjeant for the defendant objected that she was not a competent witness without a release. As the goods were furnished to her, and were now her property, she was *prima facie* liable for them, and she had therefore a direct interest to fix that liability on another person.

The *Attorney General*, *contra*, contended, that she was quite an indifferent witness; since the plaintiff, by bringing his action against Mr. *Wardle*, disclaimed all right to sue her, in the same manner as if he had formerly released her.

Lord *ELLENBOROUGH* was at first inclined to think that the witness could never be charged for these goods, and had no interest in the verdict; but afterwards thought a release was necessary, as she might have misled the plaintiff by misrepresenting the conduct of the defendant, and might still be liable if this were detected.

A release was accordingly executed to her, by the name of *Mary Anne Clarke*. She was then asked, whether she was not married? She said that she was; but that she had long lived apart from her husband.

1809.
WRIGHT
v.
WARDLE.

Best, Serjeant, insisted that the release should be executed to him.

The *Attorney General* argued, that if she was a married woman she had no interest whatever, as she could not herself be sued for the goods even had credit been given to her alone; and that her husband could not be liable for articles furnished to her in the situation in which she then lived.

Best, Serjeant, answered, that a married woman was an incompetent witness in a question in which her husband was interested; that for any thing proved, these goods might be suitable to the fortune and degree of Mrs. Clarke's husband; and that the Judge would not try in this incidental manner, whether she had done or was doing any thing to discharge her husband from all liability for the debts which she contracted.

The *Attorney-General* said, the plaintiff was ready to execute a release to the husband,—which was done accordingly.

Mrs. Clarke then proceeded with her evidence, and the plaintiff had a verdict.

1809.

WRIGHT

v.

WARDLE.

The *Attorney General, Garrow, and G. Best* for the plaintiff.

Best, Serjeant, Park and Marryatt for the defendant.

[*Attorneys, Stokes and Corfield.*]

If husband and wife are not parties on the record, it does not seem perfectly settled, in what cases the one may be a witness where the interests of the other are at stake. In *Williams v. Johnson*, 1 Str. 504, which was an action for wedding clothes furnished to the defendant's wife, the mother-in-law was admitted to prove that they were delivered on the credit of her husband, and thereby to charge him. But in *Davies v. Duwiddie*, 4 T. R. 678, where the action was brought by the trustees of a married woman for taking, under an execution against the husband, goods se-

cured to the sole and separate use of the wife, the husband was held not to be a competent witness to prove the identity of the goods, although it was argued that he came to speak against his interest, as if the goods were not rightfully taken in execution, the debt remained unsatisfied.—Wherever the husband or wife is a party, the evidence of the other is invariably excluded on grounds of *policy*, whatever the tendency of the evidence tendered may be on the score of *interest*. Vide *Broughton v. Harper*, 2 Lord Raym. 752. *Rex. v. Cliveger*, 2 T. R. 263. *Bentley v. Cook*, 2 T. R. 265.

ADJOURNED SITTINGS IN LONDON.

WRIGHT v. DANNAH.

Tuesday,
July 4.

GOODS bargained and sold.—Plea, the general issue.

The action was brought for the value of four sacks of clover seed. The parties having met on the corn exchange in London, entered into a negotiation for the sale of this seed; and after they had agreed on the price, the plaintiff wrote the following memorandum of the contract.

A memorandum of the tale of goods under the 17th section of the Statute of Frauds, cannot be signed by one of the contracting parties as the authorized agent of the other, the agent must be a third person.

“ Robert Dannah, Windley, near Derby.

4 Sacks clover seed, at 6l. 18s.

Per Fly Boat.”

After the plaintiff had written this memorandum, the defendant who overlooked him while he wrote it, desired him to alter the figures 18 to 16,—6l. 16s. being the price agreed on. This the plaintiff accordingly did. They then parted, the memorandum being left with the defendant.

1809.
 WRIGHT
 v.
 DANNAH.

Park objected that this was not a sufficient memorandum within the statute of frauds, not being signed by the party to be charged by it, or his authorized agent (*a*).

Garrow and *Puller*, *contra*, submitted that the defendant had made the plaintiff his agent for the purpose of signing the memorandum, by overlooking and approving of what he had written; and they put the case of a man incapable from disease or ignorance of writing for himself.

Lord ELLENBOROUGH said, the agent must be some third person, and could not be the other contracting party.

Plaintiff nonsuited.

Garrow and *Puller* for the plaintiff.

Park for the defendant.

[Attorneys, *Wild* and *Bleasdale*.]

(*a*) 29 Car. 2. c. 3. s. 17, enacts, "that no contract for the sale of any goods, &c. for the price of 10l. or upwards, shall be good except, &c. or that some note or memorandum in

writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

This

This case will probably be considered as governing the construction of the 4th section, concerning promises by executors, sureties, &c. in which the words as to the agent are nearly

the same as if the 17th.—The 3d section, relating to assignments and surrenders of leases, &c. requires that the agent shall be authorized by writing.

1809.

WRIGHT
v.
DANNAH.

LEEDS AND OTHERS v. LANCASHIRE.

Tuesday,
July 4.

THE plaintiffs declared as payees of a promissory note made by the defendant for 200l. The first count stated the note as payable on request; the second as payable six months after date.

The instrument adduced in evidence, was in the following form:

" We jointly and severally promise to pay to Mr. Thomas Leeds and Co. (the plaintiffs) or order, the sum of 200l. for value received by us. As witness our hands this 8th day of Sept. 1808.

Jas. Marriott,
Jas. Lancashire.
Edward Ball."

of the sureties, the payee cannot declare upon this instrument as a promissory note, on demand, or at six months after date. Between these parties, the instrument is an *agreement*, and must be stamped and declared on as such.

Upon an instrument in the common form of a joint and several promissory note, signed by three persons, there is an indorsement written at the time of signing it, stating that the note is taken as a security for all balances to the amount of the sum within specified which one of the three might happen to owe to the payee; that the note should be in force six months; and that no money should be liable to be called for sooner in any case. In an action against one payable either *agreement*, and

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LLEDS
and another

v.
LANCASHIRE.

On the back of the paper were these words, which were proved to have been written before it was signed by *Lancashire or Ball*:

“The within note is taken for security of all such balances as James Marriott may happen to owe to Thomas Leeds and Co. not extending further than the within named sum of 200l.; but this note to be in force for six months, and no money liable to be called for sooner in any case.”

It appeared that there were mercantile dealings between the plaintiffs and Marriott, in the course of which he became indebted to them; and that they refused to deal with him any longer, unless he procured a guarantie from some responsible persons. Upon this, the above instrument was made. It was impressed with a promissory-note stamp, and the makers represented it to the plaintiffs as a binding promissory note.

Garrow for the defendant objected, however, that it was in reality *an agreement*, and ought to have been stamped and declared upon accordingly.

Park and *Littledale* contended, that this instrument must either be considered a promissory note payable on demand, or a promissory note payable in six months. It was made payable to the plaintiffs *or order*, and therefore was negotiable. Might it not then have been declared on as a promissory note in

the hands of an indorsee for value? But it must be so equally in the hands of the payees. The indorsement being repugnant to the body of the bill, might be rejected entirely; and if it were construed as a defeasance, it could not operate further than to prevent the bill from being put in suit till six months after its date, and to let in evidence on the part of the defendant that no balance was then due to the plaintiffs from *James Marriott*.

. Lord ELLENBOROUGH.—As between these parties, the instrument in question is only an agreement, and not a promissory note. In the hands of a *bona fide* holder, who received it as a promissory note, it might possibly be considered as such; but the present plaintiffs can only treat it as a guarantee for *Marriott* to the amount of 200*l*. As to them, the indorsement must be incorporated with the body of the note. It is clear, therefore, that they cannot maintain an action upon it without an agreement stamp.

Plaintiffs nonsuited.

Park and Littledale for the plaintiffs.

Garrow for the defendant.

[Attorneys, *Ellis and Blakelock*.]

It was formerly thought a promissory note might in some cases be payable on a contin-

gency. *Andrews v. Franklin*, Stra. 24. *Dawkes v. Lord Deloraire*, 2 Bl. Rep. 784. But

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LLEDS
and others
v.
LANCASHIRE.

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LEEDS
 and others
 v.
 LANCASTER.

it is now fully settled that there is no distinction in this respect between promissory notes and bills of exchange, and that if the money is not payable at

all events, the instrument must be treated as a special agreement. *Carlos v. Fancourt*, in error, 5 T. R. 482.

Tuesday,
July 6.

SMITH v. MULLETT.

In an action by the fourth, against the first indorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the two-penny post office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d. Held, that by this laches the plaintiff had discharged all the prior indorsees, although in the course of the 22d, notice of the dishonour was given both to the second indorsee and to the defendant.

ACTION against the indorser of a bill of exchange drawn by one *Mills*, payable to his own order, and indorsed by him to the defendant, by the defendant to one *Hefford*, by *Hefford* to one *Aylett*, by *Aylett* to the plaintiff, and by the plaintiff to one *Lowe*.

The bill became due on Saturday, May 19th, when it was in *Lowe's* hands. He and all the parties to it resided in the metropolis. On Monday the 20th, *Lowe* gave notice to the plaintiff that the bill had been dishonoured. On Tuesday afternoon, a few minutes past five, the plaintiff's clerk put a letter into the two-penny post office, giving notice to *Aylett*. This letter having been put in so late, according to the course of the two-penny post, was not delivered out till Wednesday morning. On Wednesday *Aylett* gave notice to *Hefford*, and *Hefford* to the defendant. The question was, whether the defendant had received due notice of the dishonour of the bill.

Park

Park and *Coltman* maintained that the notice was sufficient on the authority of *Scott v. Lifford*, 1 Campb. 246. where a bill of exchange, all the parties to which resided in London or the vicinity, becoming due on the 4th of the month, it was then presented for payment by the payee's bankers, who returned it to him dishonoured on the 5th, and the court held that a letter from him, put into the two-penny post on the 6th (at what hour did not appear), was reasonable notice to the drawer of the dishonour of the bill. The rule therefore was, that every indorsee should have a day to give notice to his indorser; and here reckoning the number of indorsees, it would be found that the defendant had received notice a day sooner than he had a right to require it.

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SMITH
v.
MULLETT.

Lord ELLENBOROUGH.—It is of great importance that there should be an established rule upon this subject, and I think there can be none more convenient than that where the parties reside in London, each party should have a day to give notice. I have before said, the holder of a bill of exchange is not, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonour. It is enough if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed,—a man and horse must be employed, and you will have a race against time.—But here *a day has been lost*. The plaintiff had notice himself on the Monday, and does not give notice to his indorser till the Wednesday.

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v.
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day. If a party has an entire day, he must send off his letter conveying the notice, within post time of that day. The plaintiff only *wrote* the letter to *Aylett* on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night, as lie at the post office. He has clearly been guilty of laches, by which the defendant is discharged.

Plaintiff nonsuited.

Park and Coltman for the plaintiff.

Garrow and Comyn for the defendant.

[Attorneys, *Wasbrough and Crook.*]

In *Marsh v. Maxwell*, tried during the same sittings, Lord Ellenborough ruled, that upon the dishonour of a bill, it is not enough that the drawer or indorser receives notice in as many days as there are subsequent

indorsees, unless it is shewn that each indorsee gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorsers are discharged.

*

PIERSON v. HUTCHINSON.

Friday, July 7.

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The *Attorney General* in opening the plaintiff's case stated, that he should not be able to produce the bill, as it had been lost; but he should prove that before the action was brought, the defendant had been regularly called upon for payment, and had been offered an unexceptionable indemnity. According to the usage of merchants, he was thereupon bound to honour his acceptance in the same manner as if the bill had still remained in the plaintiff's hands, and had been actually presented to him in the usual form. It is laid down by *Marius* (a), that when an accepted bill is lost, the party to whom it is payable should notify this to the acceptor; "and when the bill fails due, and the time "is come for him to go for the money, the party "which had accepted the bill is not freed from pre- "sent payment of the money, because the bill is lost; "for though the accepted bill be lost, yet he that "accepted it is not: Neither must the acceptor think "this to be a sufficient answer for him to say, *shew* "me my accepted bill and I will pay you, and such "like flams, merely to make use of the money a little "longer time. He may, in case of obstinacy, be "sued at law for the money without the accepted

An action at law cannot be maintained against the acceptor of a bill of exchange, which was lost, after being indorsed, although a bond of indemnity has been tendered to the defendant.

(a) *Marius on Bills of Exchange*, p. 19. fol. ed.

"bill,

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v.
HUTCHINSON.

"bill, and be forced to the payment thereof with "costs and damages ; and therefore merely by reason "of the loss of the accepted bill, he can have no just "cause or plea to detain the money beyond the just "time from the right party who should receive the "same." *Marius* then goes on to say, that for this purpose the party entitled to payment has only to give bond or other reasonable writing to the content and good liking of the party that did accept the bill, and such as in reason he cannot refuse, engaging to save him harmless from the accepted bill which is lost, and to discharge him from the sum therein mentioned against the drawer and all others in due form.—Therefore, if it should appear in the present case, that the indemnity offered was such as in reason the defendant could not refuse, the production of the bill would be dispensed with, and the acceptance being proved by secondary evidence, the plaintiff would be entitled to a verdict.

"Lord ELLENBOROUGH.—If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged, is no bar to the proceedings. I remember a case before Mr. Justice BULLER, where the prisoner had destroyed a bank note he was accused of having forged, by swallowing it. He was acquitted on the merits : but the learned Judge who presided held, that he might have been convicted without the production of the bank note, and this doctrine was approved of by the whole profession. Here, however, the

the instrument is not destroyed. It is lost after being indorsed by the payee. It may now be in the hands of a bona fide indorsee for value, who might maintain an action upon it against the defendant. This brings it to the indemnity. But whether an indemnity be sufficient or insufficient, is a question of which a court of law cannot judge. There are *dicta* to be sure, that upon the offer of an indemnity the indorsee of a lost bill may recover at law; but these are so contrary to the principles on which our judicial system rests, that I cannot venture to proceed upon them. Since the plaintiff can neither produce the bill nor prove that it is destroyed, he must resort to a court of equity for relief.

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PIERSON

v.

HUTCHINSON.

The *Attorney-General* said they could shew that the bill had been discounted for the defendant's accommodation, and that the money had come into his hands; but Lord ELLENBOROUGH observed, that would not alter the case; for if the plaintiff were allowed to recover on the money counts, the defendant might still be compelled to pay the same sum a second time to a bona fide holder of the bill.

Plaintiff nonsuited.

The *Attorney-General*, *Holroyd*, and *Bolland*, for the plaintiff.

Garrow for the defendant

[*Attorneys, Smith and Sherwood.*]

In

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* In *Hart v. King*, 12 Mod. 310, which was an action against the drawer of a bill of exchange which had been lost after it was protested, Lord Holt is stated to have ruled, that the plaintiff was entitled to recover, on proving an acknowledgment by the defendant that he had drawn the bill. But from the report it does not appear in what character the plaintiff sued, and as there is no mention of any indemnity, it is probable that the bill had never been indorsed.

In *Ex parte Greenway*, 6 Ves. Jun. 81st. Lord Eldon, C. said, "When I was Chief Justice, I tried an action in the Common Pleas upon a bill alleged to be lost, which had been previously indorsed by the payee. An indemnity was offered by bond; but I consulted the plaintiff. The counsel objected strongly on the offer of indemnity. But I never could understand by what authority courts of law compelled parties to take the indemnity."

If the bill when lost was not indorsed, and consequently no good title can be made to it, there seems no reason why an action at law may not be maintained upon it, as in the case of a lost deed.—And it has been determined that if a bill when lost had only a special in-

dorsement upon it, the indorsee may recover at law without producing the bill.

Long and others v. Baillie, Guildhall, 13th December, 1805, Cor. Lord ELLENBOROUGH.

Action against the Defendant as acceptor of a foreign bill of exchange, drawn by one Alvez payable to his own order, and specially indorsed by him to the plaintiffs.—*Lucas, clerk to Winter and Kaye*, proved that he carried the original bill to the Temple, to enable one Jones to compare it with the affidavit to hold to bail, and having done so, and taken a correct copy of it, put it into his pocket book, which was stolen on his return home. Jones proved that the copy produced was correct, and that Alvez, the drawer, had indorsed it, specially to the plaintiffs. On this evidence the plaintiffs had a verdict.

Another distinction may perhaps be taken, with respect to a bill indorsed in blank, and lost *after it has become due*. As the finder could not in that case give an effectual right of action even to an indorsee for value and without notice it may be thought that the acceptor cannot insist upon an indemnity, and that the interference of a court of equity would be unnecessary; but as the plaintiff would make out a might

prima facie case by proving the acceptance and indorsement, it might be hard to expose the acceptor, after payment of the bill without any indemnity, to the hazard of shewing by legal evidence, that the bill had been lost after it became due.

It seems extraordinary that the provision of 9 & 10 W. 3. c. 17. § 3. concerning the giving of another bill of exchange in the place of one lost, should never have been extended by the legislature beyond the case of the drawer of an inland bill,—above

the value of £1.—payable at a certain time after date expressed to be for value received, and lost within the time limited for payment.—The 3 & 4 Ann. c. 9. having given the like remedies on notes as were then in use on inland bills, may be considered as having extended it to the maker of promissory notes of a like description.

As to the mode of proceeding to enforce payment of a lost bill in equity, videlicet 1 Ves. 341, 5 Ves. Jun. 338. 6 Ves. Jun. 812.

1809.
FIRSON
v.
HUTCHINSON.

MINES v. SCULTHORPE.

Saturday, July 8.

INDEBITATUS as unpsit for goods bargained and sold; and for goods sold to defendant, and, at his request, delivered to one *Cecil Hucks*; with the usual money counts. Plea, the general issue.

If *B.* by a written guarantee undertake to *A.* to answer for the payment of goods to be sent by him to *C.*, *A.* cannot maintain indebitatus assumpitus against *B.* for the price of goods sent to *C.* accordingly, but must declare specially on the guarantee.

Hucks, a retail shopkeeper, applied to the plaintiff, a wholesale dealer, to be furnished with a quantity of cheese in the way of his trade, and referred him to the defendant as a person who would be accountable for what should be sent. The plaintiff thereupon wrote a letter to the defendant, requiring to know whether he consented to this. The defendant returned the following answer;

“*Letter No. 4*”

“Sir

1809.

MINES
v.
SCULTHORPE.

"Sir,

IN reply to yours of yesterday respecting Mr. Hicks, now inform you, I will answer for the payment of goods sent to him to the amount of 100l. for six months. Hope, after that, you will not think it necessary for me to be longer accountable, as you will, of course, become well acquainted with his manner of doing business, and that that, as well as his payments, will be quite satisfactory. I am, &c."

Goods were accordingly supplied by the plaintiff to *Hicks*, for the value of which the present action was brought.

Garrow and *Lawes* for the defendant contended, that under these circumstances *indebitatus assumpsit* would not lie, and the plaintiff ought to have declared specially upon the *guarantie*. The goods were not sold to the defendant; but to *Hicks*. He was the real debtor, and the other was only a surety. There was no debt or duty, therefore, on the part of the defendant, in consideration of which the law raised a promise. The declaration should have stated, that in consideration that the plaintiff would deliver the goods to *Hicks*, the defendant undertook to guarantee the payment of them.

The *Attorney-General, contra*, argued, that as the defendant had undertaken to *answer for the payment of goods sent*, there was a contract of sale with him, and the price of the goods so sent was a *debt for which he*

was liable, and for the payment of which the law raised a promise. According to the contract between the parties, the consideration moving from the plaintiff was executed, and the breach of the defendant's undertaking lay in the non-payment of money. Therefore, *Indebitatus assumpsit* was the proper remedy.

1809.

MINES

v.

SCULTHORPE.

Lord Ellenborough. The goods were certainly sold to *Hicks*. The defendant's undertaking is collateral, and ought to have been declared on specially.

Plaintiff nonsuited.

The *Attorney-General* and *Marryatt* for the plaintiff.

Garrow and *Lawes* for the defendant.

{*Attorneys, Wright and Garrow.*}

See all the cases upon this subject, collected and commented upon, *I Williams's Saunders*, 211. (2.)

Monday,
July 10.

SNOOK AND ANOTHER v. DAVIDSON AND
ANOTHER.

A, a merchant, at different times employs *C.*, an insurance broker to effect policies of insurance for him: *C.*, without *A's* concurrence, employs *B*, another insurance broker, to effect these policies, informing him that they were for a correspondent in the country: *B.* gets the policies effected in *A's* name, and delivers them all, except one, to *C.* *C.* becomes bankrupt, without having paid *B.* any part of the premiums, and *A.* being indebted to his estate beyond the amount. — Held, that *B.* had not a lien on the policies he detained for the general balance due to him from *C.*, and that *A.* could maintain trover for *A's* policy against *B.*, after tendering him the premiums and commission due in respect of it alone.

TROVER for a policy of insurance.

The question was, whether the defendants had a lien upon this policy for the general balance due to them from one *John Carter*?

In December 1808 and January 1809, the plaintiffs gave instructions to *Carter*, an insurance broker, to effect several policies for them. *Carter*, instead of doing so himself, without their consent or knowledge, employed the defendants, who are likewise insurance brokers, to effect the policies. He told the defendants, they were for a correspondent in the country, and it appeared from the policies themselves, which he delivered to them, that they were for the plaintiffs, as they were all filled up in their names. The defendants got the policies underwritten, and advanced the premiums; no part of which has yet been repaid to them. All the policies were delivered to *Carter*, except that on which the action was brought.

In January 1809, *Carter* was declared a bankrupt. The plaintiffs were then indebted to him in a larger sum than the balance due from him to the defendants.

Before

Before the commencement of the action, the plaintiffs tendered the defendants 17l. 6s. 6d. the amount of premiums and commission on the policy in question; but the defendants refused to deliver it up, unless the balance due to them from *Carter* were completely satisfied.

1809.

SNOK
and another
v.
DAVIDSON
and another.

Park for the plaintiffs contended, on the authority of *Maanss v. Henderson*, 1 East. 335, that the defendants could have no lien on the policy for their general balance. The principle laid down in that case was, that wherever the broker has notice that the person who employs him is himself an agent, the rights of the principal shall not be affected by the state of accounts between the other two; and it was there held that an English subject, in time of war, informing the broker that the property insured was *neutral*, was a sufficient indication to the broker that the party acted as *agent* and not on his own account. Here *Carter* expressly told the defendants that these policies were for a correspondent in the country, and the plaintiffs' names actually appeared upon the face of them.

Garrow contra, insisted that the case of *Maanss v. Henderson* differed essentially from the present. Here it appeared that the assured had not paid the premiums to any one, and they could suffer no inconvenience if called upon, while these premiums were still due to some one, to pay them to those by whom they had actually been disbursed. *Carter* might be presumed to have an authority to effect the policies

1809.

SNOOK
and another
v.
DAVIDSON
and another.

through the medium of another broker, if he could not do the business himself. The plaintiffs having enjoyed the benefit of the labour and money of the defendants, were bound to pay them what was due upon all the policies, and if they paid this to the defendants, it was clear they could not be again liable to the assignees of *Carter*, which was the proper rule for deciding the question.

Lord ELLENBOROUGH.—There is no privity between you and this party. A sub-agent employed as the defendants were, cannot acquire the broker's general lien.

Verdict for the plaintiffs.

Park and Abbott for the plaintiff.

Garrow and Gaselee for the defendants.

[Attorneys, *Wood and Atcheson*.]

According to the principle of *George v. Claggett*, 7 T. R. 359, if the agent acts under a *de l'credere* commission, and directs policies to be effected as for himself, the broker would be entitled to retain the policy in his hands, or any money received from the underwriters upon it, for the general balance as between him and the agent. Where the agent has not a *de l'credere* commission, it does not seem expressly determined, how

far he can give the insurance broker a general lien, by concealing his principal; but reasoning from analogy, it may be concluded, that without some special authority, the agent cannot convert the policy into a pledge or security for a debt due from himself to a third person. *Vide Greve v. Dubois*, 1 T. R. 112. *Dauhigny v. Duval*, 5 T. R. 604. *Mackenzie v. Scott*, 6 Bro. P. C. 280.

PARKIN

PARKIN v. DICK.

Tuesday,
July 11.

THIS was an action on a policy of insurance at and from London to the ship's port or ports of discharge in the Brazils. By a memorandum at the bottom of the policy, the insurance was declared to be on goods by the *Little Jean*, as should thereafter be declared, *each package to pay average the same as if it were separately insured.*

In the specification of interest on the back of the policy were the following articles; 9 anchors, 22 grappells, 7 cables, 20 coils of cordage.

The ship was captured on her outward voyage by a squadron of French frigates.

The *Attorney-General* for the defendant contended, that the insurance was illegal and void. By 33 G. 3. c. 2. his Majesty was authorized to prohibit the exportation of all naval stores without a licence; and by an Order in Council, dated 22 December 1807, such exportation was prohibited for a period comprehending the voyage in question. Therefore as it could hardly be contended that *anchors* and *cables* were not *naval stores*, unless the plaintiff could produce the king's licence for exporting them, he must be nonsuited.

Q 3

Garrow

Policy from London to a foreign port, "on goods as should thereafter be declared, each package to pay average, the same as if it were separately insured." A small quantity of *naval stores* was afterwards mentioned in the specification of interest, and exported in the vessel with the other goods insured, without a licence, contrary to a proclamation authorized by 33 G. 3. c. 2. Held, that the policy was entirely vitiated, and that the assured could not recover for that part of the goods the exportation of which was legal.

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PARKIN

v.

DICK.

Garraw contra, insisted that even supposing the act of parliament to have been violated, however the exporter of these articles might be liable to a penalty, the policy was not avoided, as the act contained no clause (such as was inserted in the convoy and slave trade acts) to prohibit or annul insurances on voyages undertaken contrary to its enactments.—At any rate, this could only be a question of *quantum*. The articles which came under the denomination of *naval stores* formed but a very trifling part of the cargo ; and it was expressly provided by the policy, that each package should pay average, the same as if it were separately insured. The insurance, therefore, was clearly good for all but the prohibited articles. In the late case of Law *v.* Hodgson (*a*) upon the sale of bricks, Mr. Justice LE BLANC asked if *all* the bricks were under the statute measure; thereby clearly signifying, that for so many as were not, the plaintiff might have recovered. If there were different shippers of goods on board a general ship who protected their respective interests by several policies, all these policies could not be rendered void by one of them being upon naval stores. So here it must be taken as if there were separate policies upon each package ; and, with the exception of a few articles, the assured were entitled to their stipulated indemnity from the underwriters.

Lord ELLENBOROUGH.—The objection is fatal. I have got a clause declaring policies on prohibited

(*a*) Ante 147,

voyages,

voyages, introduced into acts of parliament, for the purpose of warning the public. But it is clearly unnecessary. The illegality of such policies is a consequence of law. Nor can I separate one part of the subject matter insured from the residue. It may be a hard case if only a small quantity of naval stores be included in a cargo which is insured ; but the smallest quantity renders the adventure illegal, and I have no scales to weigh degrees of illegality. This contract is entire, and is wholly void.

1809.

PARKIN
v.
DICK.

Plaintiff nonsuited.

In the ensuing term, *Taddy* moved for a rule to shew cause why the nonsuit should not be setaside ; arguing, that the insurance was valid as to all the goods, except the naval stores, which constituted but a very small part of the cargo ; that the case was like that of a bond conditioned for the performance of some covenants that were legal and some that were illegal, where the obligee may still sue for the penalty upon the breach of any of the legal covenants ; that the legislature, by enacting that the shipper should forfeit treble the value of the naval stores exported, affixed a specific penalty to a violation of the act, but did not avoid all policies upon the voyage ; that if a policy upon a large cargo of lawful goods were to be vitiated because a small quantity of naval stores was put on board, a penalty might be inflicted infinitely greater than the legislature intended ; and that in the present case the defendant

Q 1

was

1809. was stopped from taking the objection, as the policy informed him of the nature of the goods. But—

PARKIN

v.

DICK.

The COURT said, it being rendered illegal by the act to sail with any quantity of naval stores on board, without a licence, all collateral contracts were impliedly forbidden, and vacated if entered into; that the policy could not be applied to the other goods, the voyage being unlawful and the contract entire; that the hardship was not a greater than in the case of smuggling; that the underwriters did not know what the goods were when they underwrote the policy, and if they did, might have presumed that the plaintiff had obtained a licence; that the ship was liable to be stopped on account of the naval stores on board, whereby the risk was greatly enhanced; that the assured had broken an implied warranty, not to put any thing on board the ship which would render her liable to be seized or detained; and that to allow the question to be further discussed might occasion doubts upon points of law which it was of importance that the public should consider as finally settled.

Rule refused.

Garrow, Topping, and Taddy for the plaintiff.

The *Attorney-General, Garrow, and Marryat* for the defendant.

[*Attorneys, Palmer & Tomlinson, and Blunt & Bowman.*

(a) Vide *Johnson v. Hudson*, 11 East. 180. *Gremare v. Valon*, ante 144.

STIRLING, BART. v. VAUGHAN.

Thursday,
July 13.

THIS was an action on a policy of insurance effected by the plaintiff, for himself and others concerned or as agent, on the prize No. 3, (the *Princessa*) at and from Monte Video to a port or ports of discharge in the United Kingdom, valued at 6000*l.* as per W. B.'s letter of the 10th September." The first count stated the interest to be in the KING, and that the insurance was made for his use and benefit. The second count laid the interest to be in "the flag and general officers and commanders, and other officers, seamen, marines, and soldiers, acting on a conjunct expedition of the navy and army, (amongst others) against a certain fortress upon the land, to wit, the fortress of *Monte Video*." A third count alleged that the *Princessa* was *not a ship belonging to his Majesty, or any of his subjects.* The loss was averred in all to have happened by the perils of the sea.

The captors of property in a conjunct expedition by the navy and army, against a fortress on the land, since 45 G. 3. c. 7. have an insurable interest before condemnation.

The *Princessa* was a prize captured at *Monte Video*, when that place was taken by the expedition under General Sir *Samuel Auchmuty* and Rear Admiral *Stirling*. The insurance was effected in consequence of a letter received by the plaintiff from *William Blacker*, and signed by him for himself and the other prize agents appointed by the commanders of the expedition to act on behalf of all interested in the capture.

On

1809.
 STIRLING
 v.
 VAUGHAN.

On the 10th of Sept. 1807, the *Princessa*, having been fitted up as a transport, sailed from the river *Plate*, with the fleet for *England*, under the command of Admiral *Murray*. She experienced stormy weather, and on the 23d of the month she was obliged to make signals of distress. Admiral *Murray* sent persons on board to examine her condition, and upon their report he withdrew the troops she carried, together with her crew, to other vessels, and abandoned her and her cargo upon the ocean. She was never seen or heard of afterwards.

Park insisted that the plaintiff could not recover, as the insurance had not been effected by order of any one who had an insurable interest in the prize. According to *Lucena v. Cracford* (a), there was such an interest in the crown; but still it was necessary that the insurance should be effected by some one authorized by his Majesty. In that case, Mr. *Rose*, had proved that the Dutch prizes were insured by an order from the Treasury. Perhaps it would be enough if the insurance were recognized and adopted by his Majesty's government: but here there was no evidence of that sort; *Blacker* was merely the agent of the captors, and the action was evidently brought for their benefit. The question, therefore, was reduced to this, whether they had an insurable interest at the time when the policy was

(a) 3 Bos. & Pul. 75. 2 New Rep. 269.

effected?

effected? and it was clear that they had not before condemnation, which did not take place till long after. Previous to that they had only a remote hope of advantage, which might easily have been defeated.

1809.

STIRLING
v.
VAUGHAN.

ELLENBOROUGH.—By 45 Geo. 3. c. 72. it is enacted, that in conjunct expeditions of the navy and army against any fortress upon the land, property taken thereat shall be divided among the flag and general officers, other officers, seamen, and soldiers employed, in such proportions as his Majesty shall fix, or the commanders shall agree upon. The captors of the property taken at *Monte Video*, therefore, had an insurable interest in it from the moment of the capture. Antecedently to the passing of that statute, the navy had an insurable interest in prizes taken at sea before condemnation (*a*); and the navy and army acting in a joint expedition against a land fortress, are now placed on the same footing. The plaintiff might possibly recover on the count which lays the interest in his Majesty. It is the duty of every subject to protect the property of the crown; and an insurance effected by order of the agent appointed by the commanders of his Majesty's forces, may perhaps be presumed to be authorized by the crown. But on the second count there can be no doubt. A reasonable expectation of profit has been held to be an insurable interest; and here the right of the captors could only be defeated by the crown restoring the

* (a) *Le Crag v. Hughes, Park, 358, 6th edition, Marshall, 108.*
Boehm v. Bell, 8 T. R. 154.

1809.
 STIRLING
 v.
 VAUGHAN.

property taken to the enemy. The captors had possession of the subject matter insured, and a well founded expectation of the whole being distributed among them. Therefore, a policy to protect their interest in it, is not a mere wager, but must be considered a fair and valid contract of indemnity.

Verdict for the plaintiff.

The case afterwards came before the Court, on a rule to shew cause why there should not be a new trial; when the Judges, without giving any opinion on the question, how far the insurance could be considered as effected on account of his Majesty, all agreed that the captors had an insurable interest before condemnation, and that the verdict ought clearly to stand on the second count (a).

Another action was tried on a policy *on goods* on board the same ship. The cargo consisted chiefly of

The sentence of the Court of Admiralty condemning certain goods as captured from the enemy, is conclusive evidence that they were so captured.

(a) But where a ship is taken by an English cruiser, after a proclamation by the king to detain and bring into port all vessels of the nation to which she belongs, and *before a declaration of hostilities* against that nation, the captors have not upon the commencement of hostilities an insurable interest in the prize, as they cannot claim it of right, and if the crown make a grant in their favour of

the whole or any part of it, this would be altogether *ex gratia*. Routh v. Thompson, 11 East 428. If it be stated in a case reserved that the insurance was *on account of the captors*, this precludes the consideration whether a count in the declaration can be sustained, averring the interest to be in the crown, and the insurance to be made on account of his Majesty. Id. Ib.

Jesuit's bark, which in reality had not been captured at *Monte Video* from the Spaniards, but exchanged with them for articles which were. However, by a decree of the Admiralty Court, the whole cargo was condemned as prize taken at *Monte Video*, and Lord **ELLENBOROUGH** held this conclusive evidence that it was so, in support of a count laying the interest in the captors.

1809.
STIRLING
v.
VAUGHAN.

The plaintiff recovered.

The *Attorney-General*, *Garrow* and *Taddy*, for the plaintiff.

Park, *Marryatt*, and *Carr* for the defendant.

[*Attorneys*, *Gregg & Corfield*, and *Kaye & Frishfield*.]

**Rex v. FREDERICK POLLMAN, JOHN KEYLOCK,
SARAH HARVEY, and JOHN WATSON.**

Friday,
July 14.

THIS was an indictment against the defendants, which charged that they “unlawfully and corruptly did meet, combine, conspire, consult, consent, and agree among themselves, and together with divers other evil disposed persons to the jurors unknown unlawfully and corruptly to procure and obtain, receive, have,

A conspiracy to obtain money by procuring from the Lords of the Treasury the appointment of a person to an office in the customs, is a misdemeanour at common law.

1809.

Rexv.POLMAN
and others.

have, and take, *to wit, to the use of them the said F. P., J. K., and S. H., and of certain other persons to the jurors likewise unknown*, a certain large sum of money to wit, the sum of 2,000*l.* as a compensation and reward for an appointment to be made by the Lords Commissioners of the Treasury of our Lord the King, of some person to a certain office touching and concerning his Majesty's customs; to wit, the office of a coast waiter in the Port of London, through the corrupt means and procurement of them the said *F. P., J. K., and S. H., and certain other persons to the jurors unknown*; the said office then and there being an office of public trust, touching the landing and shipping coastwise of divers goods, liable to certain duties of customs." The indictment then went on to state various overt acts in furtherance of the conspiracy. There were several other counts, which all laid the conspiracy in the same way.

Espinasse for the defendant *Polman*, proposed to argue, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast waiter; and that however reprehensible such a practice might be, it could only be made an indictable offence by act of parliament.

Lord ELLENBOROUGH.—If that be a question, it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of *Rex v. Vaughan*

v. *Vaughan* in *Burrow* (*a*), it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.

1809.
Rex
v.
POLLMAN
& others.

GROSE, J. in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law (*b*).

It appeared that the defendants *Pollman*, *Keylock*, and *Harvey* had entered into a negotiation with one *Hesse*, to procure him the office mentioned in the indictment for the sum of 2,000*l.* which they had agreed to share amongst themselves in certain stipulated proportions ; but although this money was lodged at the banking house of *Sykes, Snaith, & Co.* in which the defendant *Watson* was a partner, and he knew it was to be paid to *Pollman* and *Keylock*, upon *Hesse's* appointment, there was no evidence to shew that he knew that *Sarah Harvey* was to have any part of it, or that she was at all implicated in the transaction.

An indictment against A., B., C., and D. charged, that they conspired together to obtain, " viz. to the use of them the said A., B., and C. and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Held, that the averment concerning the application of the money was material, though coming under a *viz.* and that as to D. the conspiracy was not proved as laid.

(*a*) 4 Burr. 2494, in which a criminal information was granted for offering the Duke of Grafton, then first Lord of the Treasury, the sum of 5000*l.* as a bribe to procure the reversion of the office of Clerk of the Supreme Court of the Island of Jamaica.

(*b*) Vid. 3 Inst. 447. 1 Hawk. P. C. c. 67. *Stockwell v. North, Noy, 102. Moer, 781. S. C. Rex. v. Beale, 1 East, 183. Rex. v. Southerton, 6 East, 126. Rex. v. Phillips, 6 East, 464.*

Lord

1809.

Rex
v.
POLMAN
and others.

Lord ELLENBOROUGH threw out a doubt whether as to *Watson* the indictment was supported by the evidence.

The *Attorney-General* contended, that the words in *italicks* coming under a videlicet, might be entirely rejected. The sense would be complete without them. The indictment would then run, that the defendants conspired together to obtain a large sum of money as a consideration and reward for an appointment to be made by the Lords Commissioners of the Treasury. This was the *corpus delicti*. The use to which the money might be applied was wholly immaterial. The offence of conspiring together would be complete, however the money might be disposed of. There was no occasion to state this, and the averment might be treated as surplusage. Suppose the manner in which the money was to be disposed of had been unknown, would it have been impossible to convict those engaged in the conspiracy? But without rejecting the words, the variance was immaterial. The charge in the indictment had been substantially made out as laid.

Dallas and *Walton*, of counsel for *Watson*, denied that the words could be rejected though laid under a videlicet, as they were material, and they were not repugnant to any thing that went before. The application of the money might be of the very essence of the offence. Suppose it had been obtained for the use of the Lords of the Treasury, who were to make

the appointment: Would not this be a much greater crime than if the money had been obtained for the benefit of a public charity?—But if the words were rejected, then the variance was more palpable. In that case, there being no mention of any persons to whose use the money was obtained, the necessary presumption was, that it was obtained to the use of the defendants themselves. The evidence shewed, however, that *Watson* was to have no part of it, and that he was utterly ignorant of the manner in which it was to be distributed.

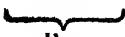
Lord ELLENBOROUGH.—There can be no doubt that the indictment might have been so drawn, as to include *Watson* in the conspiracy. Even if the manner in which the money was to be applied was unknown, this might have been stated on the face of the indictment, and then no evidence of its application would have been required. The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think, that as to *Watson*, it is not. He is charged with conspiring to procure this appointment through the medium of Mrs. *Harvey*, of whose existence, for aught that appears, he was utterly ignorant. When a conspiracy is charged, it must be charged truly.

Garrow submitted that it was necessary to prove that each of the defendants knew how the money was to be disposed of, and that it was enough to shew that the destination of the money was as stated in the indictment—a fact of which all those engaged

1809.
RFX
v.
POELMAN
& others.

If a banker permits a sum of
money to be paid
over to a conspirator,
and gives him
instructions
and for a
conspiracy along
with those who
procure
and to receive
the money.

1809.


 REX
v.
POLLMAN
and others.

in the conspiracy must be taken to be cognizant. *Watson*, by engaging with the other conspirators to gain the same end, had adopted the means by which the end was to be accomplished.

Lord ELLENBOROUGH.—You must prove that all the defendants were cognizant of the object of the conspiracy, and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous.—The defendant *Watson* must be acquitted.

The other three defendants were found guilty.

The *Attorney-General*, *Garrow*, and *Richardson*, for the prosecution.

Dallas, *Walton*, The *Common Serjeant*, *Lawes*, *Espinasse*, and *Gaselec*, for the defendants.

[*Attorneys, Lichfield and Aubrey.*]

Now, by stat. 49 G. 3. c. 125. § 3. it is declared and enacted, that if any person or persons shall sell, or bargain for the sale of, or receive, have, or take, any money, fee, &c. directly or indirectly, or any promise, &c. for any office, commission, place, or employment in the gift of the crown, or for any deputation thereto, or for any part, parcel, or participation of the

profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or voice of any person to any such appointment, nomination, or resignation; then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet, or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor.

meanor. By § 4 and 5 it is made a misdemeanour to receive or take, or to pay or give any money or promise for the soliciting or obtaining of offices; or to open or keep any house for transacting business relating thereto; and § 6. imposes a penalty of 50l. upon any person who shall publish, or procure or permit to be published, any advertisement or proposal for the above purposes. And by 49 Geo. 3. c. 118. any person paying or promising any money or reward to procure himself to be returned to serve in parliament shall, if not returned, forfeit 1,000l.; if returned, vacate his seat, and be incapacitated to serve during that parliament, for

the same place; and the person receiving such money or promise shall forfeit the amount, together with 500l. and if any person give or promise any office upon *any express contract or agreement* to procure the return of any person to serve in parliament, the person returned shall vacate his seat, and be incapacitated as before; the person receiving the office shall forfeit it, be disabled to hold it, and incur a penalty of 500l.; and any person holding any office under His Majesty, who shall give an office, appointment, or place, upon *any such express contract or agreement*, shall forfeit the sum of 1,000l.

ELIA
v.
POLLMAN
and others.

PARMETER *v.* COUSINS.

Saturday,
July 15.

THIS was an action on a policy of insurance on ship and freight, valued at 1,200*l.* at and from St. Michael's, or all or any of the Western Islands, to England.

The ship met with very tempestuous weather on her outward voyage; and when she arrived at St. Michael's she was so leaky that the crew were obliged to work at the pumps *spell and spell*. She was

Policy at and from the island of St. Michael's.
The ship arrived there in a very dire state, and latterly at about or above 24 hours in great danger from a storm, was blown out to sea and wrecked. Held that the policy on the homeward voyage never attached.

1809.
 PARMLIER
v.
 COUSINS. was then quite in an unfit state to take in a cargo, and there being no harbour in the island, she was in great danger from the storm, which still continued. In fact, after lying at anchor above 24 hours, she was blown out to sea and was wrecked.

Park for the plaintiff contended, that the underwriters were clearly answerable for a loss so happening. The policy being *at* as well as *from*, attached the moment the ship cast anchor at *St. Michael's*; and at any rate she had lain there 24 hours, so that the outward risk had completely expired. The objection of want of sea-worthiness when properly considered was without any foundation. The ship, on her arrival at *St. Michael's*, was unfit to commence the homeward voyage; but this was unnecessary. It was enough if she was fit for the voyage, when the voyage commenced. One state of sea-worthiness was required while she remained *at*, and another when she sailed *from*, the place. This distinction had been settled by *Lord Kenyon* (*a*), and recognized by *Lord Ellenborough* (*b*). If it were not allowed, the policies on the homeward voyage would in almost every instance be vitiated; as it seldom happens that a ship on her arrival at the outward port wants no repairs, but is in a condition immediately to take in the homeward cargo. If, in this case, the policy on the outward voyage had

(*a*) *Forbes v. Wilson, Park,* (*b*) *Hibbert v. Martin, Sitt.*
 299 n. *Marsh.* 155. *Smith v.* *after M. T.* 1808.
Surridge, 1 Esp. 20. *S. P.*

expired, and the policy on the homeward voyage had not attached, how was the ship-owner to secure himself an indemnity during the whole course of the adventure?

1809.

PARRY
v.
COUSINS.

Lord ELLENBOROUGH.—What we have to consider here is, whether the underwriters on this ship, *at and from St. Michael's to England*, be liable for a loss happening in the manner that had been described? And I am clearly of opinion, that they are not. To be sure, while the ship remains *at* the place, a state of repair and equipment may be sufficient, which would constitute unsea-worthiness after the commencement of the voyage. But while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches. Such is the present case. I do not remember any one like it; but the principles on which it must be decided are perfectly well established.

Plaintiff non-suited.

Park and Richardson for the plaintiff.

The Attorney-General, Garrot, Scarlett, Barrow,
and *F. Pollock*, for the defendant.

[*Attorneys, Sherwood and Barrow.*]

In *Mitteaux v. The London Assurance Co.* 1 Atk. 518, Lord Chancellor HARDWICKE says that a case came before him

1809.

PARMENTIER
v.
COUSINS

When Chief Justice of Guildhall, in which it was debated, "whether *at and from Bengal to England* meant the first arrival of the ship at Bengal." And it was agreed the words *first arrived* were implied and always understood in policy. I do not find, in that, more in the book concerning the time at which he goes on ship, at and from a *foreign port*, attaches, and that there is no doubt that the rule laid down by Lord Hardwicke, qualified by the case of *Parmentier v. Cousins*, is to be considered as established law upon the subject. But I shall,

it might have been better to have held, that the policy on the homeward voyage commences at the time when that on the outward voyage expires. Suppose a ship to arrive safe at the outward port, and to be wrecked or captured before she has been noored 24 hours in good safety, the assured being *a thimordinary period* during this period, may make then election between the underwriters on the outward or on the homeward voyage, and some confusion, if not injustice, may arise in finally adjusting the loss.

Wednesday
July 1st.

SCOTT v. MINTRODGE.

An action
a "t" cannot
be maintained
on account
of a debt con-
cerning a
ship or
property
at law being
an action of
account.

A ~~summons~~ for commission on the sale of goods
for money paid, for money held and received,
and on an account stated. Plea, the general issue.

This action was brought to recover the balance of an account which had been running between the parties for several years, and which consisted of several thousand items. The plaintiff's case being opened by the *Attorney-General*,

Lord TENTERBROUGH said, this being strictly a matter of account, if it was to be investigated in a court of law, the action of account was the proper remedy.

remedy. I should be fully warranted in stopping the trial and requiring the plaintiff to institute a different mode of proceeding. Those who so wisely framed our jurisdictions did not contemplate a long account between merchants being referred to a jury. This tribunal is quite unfit for such an investigation, and we have not the necessary time to bestow upon it. Let the plaintiff bring his action of account, and auditors will be appointed who will do justice between the parties, without producing any inconvenience to the public.

The *Attorney-General* allowed that the action of account was the proper mode of proceeding; but said assumption had been brought, in the confidence that the matters in difference would have been referred to an arbitrator, who would have performed the office of the auditors.

The defendant would not agree to a reference, and the plaintiff submitted to be insulted.

The *Attorney-General*, *Garrow*, and *Taddy* for the plaintiff.

Best, *Serjeant*, *Marryatt*, and *Laws*, for the defendant.

[*Attorneys, Kaye & Freshfield and Wild & Annesley.*]

“ *On indebitatus* no evidence “ current, because such exami-
“ can be given of an account “ nation would be too tedious

1809.
—
Scott
v.
M'Intosh.

1809.

SCOTT
v.
M'INTOSH.

" upon issues; and therefore
" upon this case, an action of
" account is provided whereon
" there is judgment *quod comput-*
" *tet* before a master or auditor
" where the whole matters on

" both sides are examined, sta-
" " ted, and balanced." Gilb.
Law Ev. 192.—Vide etiam,
Lincoln v. Parr, 2 Keb. 781.
Tri. per. Pais, 401.

Wednesday,
Jul 19.

ZAGURY v. FURNELL and another.

Goods sold re-
main at the risk
of the seller
while any thing
is to be done to
them by him to
ascertain the
amount of the
price. There-
fore where 289
bales of skins
(stated in the
contract to con-
tain 5 dozen in
each bale) were
sold at 57s. 6d.
a dozen, and it
was the duty of
the seller to count
or the skins to
see how many
a dozen bale actu-
ally contained;
but before any
enumeration
took place, the
whole were con-
signed by fire;—
held, that an ac-
tion could not be
maintained
against the

SPECIAL assumpsit for not accepting bills of
exchange for the price of certain goat skins sold
by the plaintiff to the defendants, to be paid for in
this manner; together with counts for goods bar-
gained and sold, and goods sold and delivered.

The *bought note* was in the following form:

" Bought of Mr. S. Zagury, of Great Pres-
" cott Street, 289 bales of goat skins from Mogag-
" dore, per Commerce, Capt. John Horswell, con-
" taining five dozen in each bale at the rate of 57s.
" 6d. per dozen, to be taken as they now lay with
" all faults, paid for by good bills at 5 months.

" London, 27th April, 1809.

" 14 days prompt."

purchaser for the value of the skins, and that the loss fell entirely upon the seller.

It

It appeared that by the usage of trade it is the duty of the seller of goat skins by bales in this manner, to count them over, that it may be seen whether each bale contains the number specified in the contract, and that on the 14th of May, before any of the skins in question had been counted over, the whole were destroyed by fire at the wharf where they lay at the time of the sale.

1809.
ZACRY
v.
FURNELL
and another.

The *Attorney-General*, for the defendant contended, on the authority of *Hanson v. Meyer*, 6 East, 614, and *Hinde v. Whitehouse*, 7 East, 558, that the action could not be maintained. Something remained to be done by the vendor to ascertain the amount of the price. Till the enumeration took place, it was impossible to say for what sum the bills should be drawn. The plaintiff had not shewn, and could not shew, that he had a right to draw the bills which the defendant refused to accept. Till the skins were counted, therefore, they remained at the risk of the seller, and he must submit to the loss.

Garrow, contra, argued that the loss must fall upon the person whose property the goods were; and there could be no doubt that from the moment the contract was signed, the property of the goods vested in the purchaser. As to the number of the skins, probable evidence must be sufficient in this as in other cases. It would be for the jury to say, whether they believed that there were five dozen, or what smaller number, in each bale.

Lord

1809.

ZACURY
v.
FURNILL
and another.

Lord ELLNBOROUGH was of opinion, that as the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller; and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. The number of skins actually contained in the 289 bales being uncertain, the plaintiff had failed to shew that he was authorised by the terms of the contract to draw the bills which the defendants had refused to accept.

Plaintiff nonsuited.

Garrow, Taddy, and Smith, for the plaintiff.

The *Attorney-General, Marryatt, and Barnewall* for the defendants.

[*Attorneys, Annesley and Willis.*

The Plaintiff afterwards brought an action on the same contract in the court of *C. P.* which was tried at the sittings after last Hilary term. Sir J. MANSFIELD, C. J. likewise directed a nonsuit, being of opinion that it was necessary to shew the number of the skins;

and that, without this evidence, the plaintiff could not recover on the general counts for goods bargained and sold, any more than on the special counts for not accepting the bills of exchange. Vide *Rugg v. Minett*, 11 East, 210. *Phillimore v. Barry*, 1 Campb. 513.

HARMAN

HARMAN and others, Assignees of Dudley, a Bankrupt *v.* ANDERSON and others.

Thursday,
July 20.

T ROVER for 600 casks of butter.

The bankrupt, an Irish provision merchant, in December 1807, bought the goods in question, which were then lying in the warehouses of the defendants, who are wharfingers in the Borough. Along with the invoice the bankrupt received from the sellers an order to deliver the goods, which he lodged with the defendants. The defendants thereupon transferred the goods in their books to his name, and actually debited him with warehouse rent. Immediately after the goods had been so transferred, he became insolvent, and the sellers gave the defendants notice to hold the goods on their account. A commission of bankrupt being sued out against *Dudley*, the plaintiff's as his assignee's demanded the goods of the defendants, but they delivered the whole of them back to the sellers.

The *Attorney-General* for the defendants argued, that they were justified in doing so, on the ground that the sellers right to stop in transitu subsisted at the time of Dudley's insolvency. The goods remaining with the wharfingers could not be considered as delivered to him, and he had never exercised any act of ownership over them. The wharfingers were

When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them in transitu is gone, and the wharfinger is bound to hold them as the agent of the purchaser.

It per Curiam in Banco. The same effect is produced by the delivery-note being lodged with the wharfinger, without a transfer in his books.

not

1809.

HARSH
and others
v.
ANDERSON
and others.

not his agents, but the agents of the sellers. No such effect as determining the right to stop in transitu could be ascribed to the transfer in the wharfingers books, without entirely altering the law upon this subject; as it almost invariably happens that goods sent by a carrier are booked in the name of the consignee, and goods are made deliverable to the purchaser in almost every bill of lading.

Best, Serjeant, relied upon the case of *Hurry v. Mangles*, 1 Campb. 452, in which it was held, that if goods when sold remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a delivery of the goods to the purchaser, so as to put an end to the vendor's right of stopping them in transitu. Here, rent had been charged by the defendants to *Dudley* from the time they transferred the goods into his name. There is a clear difference between the case of a carrier, and that of a warehouseman or wharfinger like the defendants. While the goods are in the hands of the carrier, they are still in transitu; but when they come to the warehouseman or wharfinger who finally holds them for the real owner, they have reached their destination, and the transit is at an end.

Lord ELLENBOROUGH.—The goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage in transitu. From that moment the defendants became trustees for the purchaser, and there was

was an executed delivery as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to shew on whose account the goods are held; but it is immaterial here, the transfer in the books being of itself decisive. I am clearly of opinion that the assignees are entitled to recover.

1809.

HARMAN
and others
v.
ANDERSON
and others.

Verdict for the plaintiffs.

In the ensuing term, the *Attorney-General* expressed his acquiescence in the direction of the Judge at Nisi Pris; but moved to reduce the damages, on an affidavit, stating, that as to one parcel of the butters, no transfer had been made in the defendant's books to the bankrupt before the bankruptcy. In respect to this parcel, the facts were, that *Dudley* having received the delivery note from the vendor, sent it to the defendants, in whose warehouse the goods were lying; and that they neither made any transfer in their books to his name, nor did anything to testify that they accepted the delivery note or held these goods on his account. There had been no delivery therefore of this parcel, and the right of stopping in transitu still subsisted when the vendor interfered.

Lord ELLENBOROUGH.—After the note was delivered to the wharsingers, they were bound to hold the goods on account of the purchaser. The delivery note

1809.

HARMAN
and others

v.

ANDERSON
and others.

note was sufficient, without any actual transfer being made in their books. From thenceforth, they became the agents of *Dudley*, the bankrupt. They themselves might have a lien on the goods, and be justified in detaining them till that was satisfied; but as between vendor and vendee, the delivery was complete, and the right to stop in transitu was gone.

The other Judges concurred, and a rule to shew cause was refused.

Best, Serjeant, *Marryatt*, and *Comyn* for the plaintiffs.

The *Attorney-General*, *Garrow*, and *Lawes* for the defendants.

[Attorneys, *Williams*, and *Palmer & Tomlinson*.]

Vide *Northie v. Cragg*, 2 Esp. Rep. 85. *Owenson v. Esp. Rep.* 613. *Ellis v. Hunt, Moss*, 7 T. R. 64. *Hammond* 3 T. R. 468. *Wright v. Lawes*, v. *Anderson*, 1 New Rep. 69.

WRIGHT

WRIGHT v. SHIFFNER.

Friday, July 21.

THIS was an action on a policy of insurance on the freight of the ship *Bellona* "at and from Surinam, and all or any of the West India Islands (except Jamaica) to London, *warranted to sail on or before the 1st of August, 1807*, at eight guineas per cent. to return four pounds per cent. for convoy and arrival."

On the 19th July, 1807, the *Bellona* having completed her cargo for the homeward voyage, sailed from *Surinam*, under convoy of the *Cerberus* frigate for *Tortola*, there to join the general West India convoy from thence to London. She arrived at *Tortola* on the 5th of August, and sailed on the 8th of the same month for London with a large fleet, under convoy of the *Arab* ship of war. On the 26th of September, she was wrecked on the coast of *Cornwall*.

The question was, whether the warranty had been complied with, that the ship should sail on or before the 1st of August.

Marryatt for the plaintiff insisted, that it was enough if the homeward-bound voyage had commenced by the given day,—if the ship sailed from the port

If in a policy of insurance "at and from Surinam, and all or any of the West India island to London," the ship is warranted to sail on or before the 1st of August, it is a sufficient compliance with the warranty if she sail on or before that day from her final port of loading on the homeward voyage, although she afterwards touch at one of the West India islands to join convoy.

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~~~~~  
WRIGHT  
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port where her loading was completed to join convoy at the usual place of rendezvous, with the intention of proceeding, according to the established course of navigation, to her port of final destination. This was decided in *Bond v. Nutt*, Cowp. 601, where a ship being warranted to sail from *Jamaica* on or before the 1st of August, it was held sufficient that she sailed before that day to *Bluefields* to join convoy, although this place was not in the direct line of the voyage insured. So in *Thellusson v. Ferguson*, Doug. 346, a ship warranted to sail from *Guadaloupe* before the 31st of December, sailed on the 24th of October to *Basseterre* to join convoy and receive the orders of government, where she was detained till the 10th of January, yet the sailing to *Basseterre* was held a compliance with the warranty. The circumstance in this case, that the insurance was from *Surinam* or all or any of the West India islands, could make no difference, as that latitude was evidently introduced for the benefit of the assured, and when the ship sailed from the port of lading on the homeward voyage, it was the same as if that were the only place *at and from* mentioned in the policy.

The *Attorney-General, contra*, maintained that it was requisite that the ship should have sailed from the *West Indies* on or before the 1st of August. Had the insurance been barely from *Surinam* to *England*, the cases cited would have been conclusive; but by the terms of the policy, any of the *West India*

India islands, except *Jamaica*, might become a *terminus a quo*, and if the ship touched at any of them, she was bound to sail from it for London by the given day. *Tortola* had in fact been made the port from which the homeward voyage commenced ; and as she did not sail from thence till the 8th of August, the warranty was falsified. The object of the underwriters was, that the ship should have cleared the West India seas by the 1st of August; and if she had done so, she would have arrived safe in England.

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v.  
SHEFFNER.

Lord ELLENBOROUGH held, that, as the vessel came to *Tortola*, not to take in goods or stores, but merely to join convoy, the homeward voyage must be considered as having commenced on the 19th of July, when she sailed from *Surinam*. *Surinam* becoming the only loading port, the remaining description of the risk might be considered as struck out of the policy. The warranty therefore had been complied with, according to the principle of former decisions.

Mr. *Taylor*, a special juryman, said, that this was the construction universally put upon these policies in the city of London.

The plaintiff had a verdict; which, on a motion for a new trial, the Court afterwards affirmed, observing, that it was enough if there was an inception

1809. of the homeward voyage before the 1st of August ;  
**Wright v.  
Sheffner.** that the sailing to Tortola to join convoy was in the course of the voyage home ; and that Surinam being the final port of loading, the case was the same as if that place only had been mentioned in the policy as the *terminus a quo*.

*Marryatt* and *Bosunquet* for the plaintiffs.

The *Attorney-General* and *Carr* for the defendant.

[*Attorneys, Atcheson and Gregg* ]

COURT

## COURT OF COMMON PLEAS.

## SITTINGS AT WESTMINSTER.

*After Trinity Term,*

49 GEORGE III.

1809.

EARL OF LIPCESTRLR v. WALTER.

Thursday,  
June 29.

THIS was an action for a libel in a newspaper called *The Morning Herald*, which stated that the plaintiff was charged by his Lady with the same offence for which Lord Audley had been executed in the reign of Charles I. The declaration began and concluded with the common averments, that the plaintiff never had been guilty, nor till the publishing of the libel been suspected to have been guilty, of any such offence, and that by reason of the publishing of this libel, his neighbours and other good and worthy subjects of our Lord the King had refused to associate with him as they were used to do and would otherwise have done. \*

In an action for a libel, the defendant, under the general issue, may prove, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion, his relations and acquaintance had ceased to associate with him.

Plea, *not guilty.*

§ 2

The

1809. The plaintiff having launched his case,

EARL OF  
LEICESTER  
v.  
WALTER.

The defendant's counsel proposed to call witnesses to prove, in mitigation of damages, that before and at the time of the publication of the libel, there was a general suspicion of the plaintiff's character and habits; that it was generally rumoured that such a charge had been brought against him; and that his relations and former acquaintance had, on this ground ceased to visit him.

*Best*, Serjeant, for the plaintiff objected to the admissibility of this evidence. It would be vain to bring an action of slander if such a course of proceeding were permitted. How could the plaintiff come prepared to defend every act of his life which might be maliciously misrepresented? The defendant pleaded only the general issue *not guilty*. The plaintiff, therefore, had no reason to suppose that any thing was disputed but the publication of the libel, and the innuendoes in the declaration. There was nothing on the record to put the character of the plaintiff in issue; and to admit such evidence would only be giving the defendant an opportunity of continuing and aggravating the original libel.

*Shepherd*, Serjeant, and *Abbott*, *contra*.—The facts to be proved do not amount to a complete justification. Therefore, they may be given in evidence under the general issue for the purpose of mitigating the damages. These facts are most material to the merits

merits of the cause, and justice cannot be done if they are shut out from the consideration of the jury. Although the plaintiff may be entitled to the verdict, a most important question remains as to the amount of the damages. How can this be ascertained without enquiring what opinion was previously entertained of the plaintiff by those who knew him, and in what manner they behaved to him? He says the libel has driven him from society, and ruined his character. If so, he is entitled to the highest measure of compensation ever given upon such an occasion; but ought he to receive more than nominal damages, if before the publication of the libel he was an outcast from society and he had no character to lose? In actions for seduction and criminal conversation, it is the constant practice to give evidence of the character of the daughter or wife. The value of the thing lost or injured must invariably be inquired into.—This principle has been expressly applied to actions of slander. In *Knobell v. Fuller*, (a), EYRE, C. J. held, that although where the defendant contends that the libel or words are true, he must justify on the record, yet he may, on the general issue, prove, in mitigation of damages, such facts and circumstances as shew a ground of suspicion, not amounting to actual proof of the plaintiff's guilt. So in *Sir John Hamer v. Merle* before Lord ELLENBOROUGH, which was an action for words of insolven-

1809.  
EARL OF  
LEICESTER  
v.  
WALTER.

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EARL OF  
LEICESTER  
*v.*  
WALTER.

cy, the defendant was permitted to prove that at the time there were rumours in circulation that the plaintiff's acceptances were dishonoured! And in a case before *LE BLANC*, J. at *Worcester*, that learned judge received evidence under the general issue, that the plaintiff had been guilty of *attempts* to commit the crime which the defendant had imputed to him.

*Best*, Serjeant, observed in reply, that the cases of seduction and criminal conversation were not in point; as there, the whole of the defence, of whatever nature, might be given in evidence under the general issue; but that if this was the law in slander, no plaintiff ought to come into court, since a malicious and artful defendant might invariably ruin his character, by shaping the defence a little short of a justification.

Sir JAMES PEANSFIELD, C. J.—In point of reasoning, I never could answer to my own satisfaction the arguments urged by my brother *Best*. At the same time, as it seems to have been decided in several cases, that if you do not justify, you may give in evidence any thing to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not,

not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted.

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LAW  
OF  
LEICESTER  
v.  
WALTERS.

The Witnesses were accordingly examined; and the CHIEF JUSTICE, in his summing up, said, The jury would consider in assessing the damages, whether the reports which had been proved were sufficient to shew that he could receive little injury; and in this point of view, it did not matter whether the reports were well or ill founded, provided they got into many men's mouths.

The jury, nevertheless, awarded the plaintiff 1,000*l.* damages.

*Shepherd, Serjeant, and Abbott* for the plaintiff.

*Best, Serjeant, for the defendant.*

The defendant afterwards moved for a *new trial*, on account of excessive damages, and in *arrest of judgment*, on the ground that some of the counts did not set out any actionable libel; but the Court wait for

the decision of the case of *Kaye v. Bailey*, depending in the Exchequer Chamber; in which the question is, whether an action will lie for words in writing which would not be actionable if merely spoken.

## HOME CIRCUIT,

SUMMER ASSIZES, 49 GEORGE III.

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### CHELMSFORD.

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CORAM Sir A. M'DONALD, C. B.

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1809.

Thursday,  
July 27.

DOE ex d. HINDE v. VINCE.

If a tenant from  
year to year hold  
from old Michael-  
mas, a notice to  
quit "at Michael-  
mas," generally  
is good.

EJECTMENT by landlord" against tenant from<sup>the</sup>  
year to year.

The lessor of the plaintiff relied upon a notice served upon the defendant at Lady-day, 1808; whereby he was required to quit and deliver up possession of the premises on *Michaelmas day then next*. It appeared that the defendant entered at *Michaelmas old style*.

*Garrow* for the defendant insisted, that the notice to quit was insufficient, as it did not specify that period of the year when the tenancy commenced. By *Michaelmas*, mentioned in the notice, must be understood *Michaelmas* as fixed by act of parliament, namely *new Michaelmas*, or the 29th day of Sept.

But

But the holding was proved to have been from *old Michaelmas*, or the 11th day of October. Therefore, as the notice did not require the defendant to quit on the latter day, but twelve days before the current year of his tenancy expired, it was clearly bad.

1809,  
*Doe ex. d.*  
HINDE  
v.  
VINCE.

Sir A. M'DONALD, C. B.—A notice to quit at *Michaelmas* generally *prima facie* means *new Michaelmas*. But besides the *statute Michaelmas*, there may be a *conventional Michaelmas*; and evidence is receivable to shew in what sense the word is used between the parties. In this case, the meaning of the notice is ascertained by the commencement of the tenancy. The holding being from *old Michaelmas*, it must be taken that in all transactions concerning the premises, where *Michaelmas* is mentioned, *old Michaelmas* is meant. This notice to quit, therefore, must be understood to specify *old Michaelmas day*, and I think it was sufficient to determine the tenancy which commenced at that season of the year.

The lessor of the plaintiff recovered.

*Shepherd*, Serjeant, and *Gurney* for the lessor of the plaintiff.

*Garrow and Lawes* for the defendant.

• [Attorneys, *Hall and Sutton*.]

S. P. ruled by Lord ELLENBOROUGH in *Doe v. Brookes* at Hertford, same assizes, *ut audiri*.

Where it was uncertain whether the year expired at *new* or *old Lady-day*, a notice to quit “on

1809.

DOL v.  
HINDE  
v.  
VANCE.

"on the 25th of March, or the 8th of April," was held sufficient, Doe dem. Mathewson v. Wrightman, 4 Esp. N. P. Cas. 6. But where there is any doubt upon this subject, the most eligible notice seems to be "to quit at the expiration of the current year of the tenancy, which shall expire next after the end of one half year from the service of the notice."

Doe dem. Phillips v. Butler, 2 Esp. N. P. Cas. 589. Trdd's Appendix 660. Nor will the landlord in this way lose the advantage he was at one time supposed to have, of throwing the burthen of proof upon the tenant; for the doctrine that a notice to quit at a particular day, is *prima facie* evidence of a holding from that day seems now exploded.

Thursday,  
July 27.

### CARRINGTON v. TAYLOR.

THIS was an action on the case for disturbing the plaintiff's ancient decoy, situate at *Baumont-cum-More*, in the county of Essex.

It is actionable to discharge a gun to hear an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy.

It appeared that the defendant, who earned his subsistence by shooting wild fowl, fired his gun from a boat in a salt water creek, at the distance of two or three hundred yards from the decoy, without approaching nearer it, or trying to kill any of the birds which had entered it; but that the report caused them to leave it in great numbers, and to fly off to a distant part of the coast.

*Garrow*

*Garrow* contended, that the action could not be maintained without evidence that the defendant had shot at the wild fowl in the decoy, or had fired his piece with the malicious intent of frightening them away. But his only object was to earn a subsistence by the business which he followed; and although the wild fowl at which he took aim, might by possibility have gone to the plaintiff's decoy, and been caught there, yet they were at the time of *common right*, as much as if they had been met with many leagues out at sea. The plaintiff was equally entitled to kill them on the wing, as the plaintiff after they were ensnared in the decoy. Some of the ducks already in the decoy might be frightened by the report; but it would be too much to say, that every noise that could be heard there, from whatever distance, was illegal and actionable; otherwise, the operations of husbandry and the business of life must be stopped for miles round the spot where one of these decoys is unfortunately situated. It was necessary, therefore, to look to the *intent*; and where that was innocent, the foundation of the action failed.

M'DONALD, C. B.—If the plaintiff has been injured and aggrieved by what the defendant has done, the law infers that the defendant maliciously intended to injure and aggrieve him. And there seems no doubt that the decoy was rendered less valuable by the wild fowl being frightened from it, and deterred from returning. This being an ancient decoy, it is privileged in law, and whatever seriously disturbs it

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CARRINGTON  
P.  
TAYLOR.

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CARRINGTON

v.

TAYLOR.

is actionable.' From long uninterrupted enjoyment, a grant must be presumed from the owners of the surrounding lands, for which an adequate consideration may be supposed to have been originally given; and an ancient decoy will be protected by the law, as well as ancient lights, or the enjoyment of a watercourse.

The plaintiff had a verdict.

In the ensuing term *Garrow* moved for a rule to shew cause why this verdict should not be set aside; and in addition to his former arguments contended, that there was no distinction between a decoy and a preserve for game, but that clearly no action could be maintained for frightening game from a *preserve* while a man shot upon his own land.

The COURT, however, said, a difference was established by the old cases between a *preserve* and a *decoy*; and thinking that a sufficient disturbance had been proved, refused a rule to shew cause.

*Shepherd*, Serjeant, and *Pooley* for the plaintiff.

*Garrow* and *Marryatt* for the defendant.

Vide *Keeble v. Hicheringill*, 11 Mod. 74. 130. 3 Salk. 9.  
Bul. N. P. 79.

1809.


 Friday,  
July 28.

## BOULCOTT v. WINMILL.

**T**RESPASS for breaking and entering the plaintiff's close in the parish of Westham, in the county of Essex, and cutting down and prostrating the pales and fences standing therein.

*Justification* under a right of common of pasture over the *locus in quo*.

*Replication*, that the *locus in quo* is, and from time immemorial has been within, and parcel of, the manor of Westham; and that there is, and from time immemorial hath been, "a certain ancient and laudable custom there used and approved of (that is to say) that at the general courts baron or customary courts from time to time holden in and for the said manor, the lord or lords thereof for the time being hath and have granted, and been used, &c. and still, &c. by the hands of the steward of the said manor for the time being, with the assent of the homage, by the rod, according to the custom of the said manor, any pieces or parcels of land within the said manor, being part of the waste thereof, to any person or persons willing to take the same, to be holden of the lord or lords of the said manor by copy of court roll thereof, at the will of the lord, &c. and that such person or persons to whom such grants have been and may be made, hath and have inclosed, fenced off, held, and enjoyed,

There may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of court roll and inclosed, in exclusion of persons having rights of common.

1809.  
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 Boultcott
 v.
 WINMILL.

and been used, &c. and still, &c. such pieces or parcels of land so granted as aforesaid, in severalty after such grants, and during the continuance thereof to his and their own use, against all persons having rights of common therein, to the exclusion and abolition of such rights of common; and that the *locus in quo* being granted to the plaintiff according to his custom, he entered and inclosed it, and kept it so inclosed till the defendant, of his own wrong, committed the trespasses attempted to be justified.

Rejoinder traversing the custom; and issue thereupon.

Various instances were proved from the year 1632 down to the present time, in which different parcels of the wastes of the manor had been granted and inclosed in the manner stated in the replication.

It further appeared that the manor of Westham lies partly within the ancient forest of Waltham, which has immemorially belonged to the crown, and that the *locus in quo* is in that part of the manor which is within the limits of the forest, and is subject to the jurisdiction of the forest courts. There was nearly an equal number of grants in the part of the manor within, as in the part of the manor without, the forest.

Shepherd, Serjeant, for the defendant contended, that in point of law the jury were bound to find against

against the custom. Within a royal forest no inclosures are to be permitted. The deer must have full range over its whole extent. This custom of inclosing is quite inconsistent with the forest rights which have been vested in the crown from time immemorial. If one part of the forest might be inclosed, so by possibility might the whole, and the forest might thus be entirely extinguished. The custom set up was tantamount to a right to disafforest at the will of the lord and the homage, which clearly could not subsist in law. The forest rights, as regulated by the charter of the forest and other statutes, were as much recognized and protected by law as any other prerogative of the crown. The verderors of Waltham forest were in the constant habit of throwing down fences and inclosures erected within its limits. The practice of granting pieces of the waste of Westham manor within the forest for the purpose of being inclosed, might have prevailed for a considerable length of time; but being entirely incompatible with the rights of the crown, it could not be considered a legal and subsisting custom.

Sir A. M'DONALD, C. B. was of opinion that the custom was clearly made out in point of fact, and wished that the question as to its compatibility with the rights of the crown might be discussed elsewhere.

Accordingly the plaintiff had a verdict, and

In the ensuing term *Shepherd*, Serjeant, applied to the court of K. B. for a rule to shew cause why the verdict

1809.

Boulcott
v.
Winmill.

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Boulcott

v.

Winmill.

verdict should not be set aside, and a new trial had. He took the same ground as at *Nisi Prius*, and contended, that no such custom could legally subsist within the limits of a royal forest.

Lord Ellenborough.—I see no reason why the waste may not legally be granted out in the manner stated in the replication, although part of the manor be within the royal forest of Waltham. The crown may still exercise the same rights of forest over it as before. Whether the deer be excluded, must depend upon the nature of the inclosures. If the fences erected are higher than are permitted by the laws of the forest, the forest officers may still interfere, and break them down. According to the custom, the grant is only to the exclusion and abolition of rights of common, not of the rights of forest. I know instances in Windsor forest in which the crown has made grants in severalty, reserving the rights of forest, with an advanced rent while these rights shall not be exercised. I think the issue has been properly found for the plaintiff.

The other Judges concurring, a rule nisi was refused.

Garrow and Marryat for the plaintiff.

Shepherd, Best, Serjeants, Gurney and Cawood for the defendant.

It was formerly doubted how far a custom for the lord to make grants of the waste with

the assent of the komage, was good, where a sufficiency of common is not left; but it is now

now settled that the practice of making such grants is evidence of a right to do so reserved by the lord when he granted a right of common over the waste, and that therefore the former right is pre-
sumed to be superior to the latter. Folkard v. Hemmett, 5 T. R. 417 n. So the lord may dig clay pits in the waste, or authorize others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. Bitesou v. Green, 5 T. R. 411. And

where there is a custom to grant parcels of the waste, as in this case, the parcels so granted are to be considered in all respects copyhold tenements as if they had been so from time immemorial. Lord Northwick v. Stanway, 3 Bos. & Pul. 316. So that where land has been *unseable* by copy of court roll a new copyhold may be created at this day.—Vide Dibberley v. Page, 2 T. R. 391. Clarkson v. Woodhouse, 5 T. R. 412. n. Shakespeare v. Pepper, 6 T. R. 741.

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Boulcott
v.
Winmill.

MAIDSTONE.

CORAM Lord ELLENBOROUGH, C. J.

1809.

Tuesday,
August 1.

POPL q. t. v. DAVIES.

THIS was an action on 1 & 2 Phil. & Mary c. 12.
s. 1. (a) for driving a distress out of the hundred.

In an action on
1 & 2 P. & M.
for driving a
distress out of
the hundred, if
the hundred in
which the cattle
were distrained
be in one county
and the hundred
into which they
were driven be
in another, the
venue must be
laid in the latter
county.

The cattle were distrained in the hundred of —
in the county of *Kent*, and were driven into the hundred of *East Brixton* in the county of *Surrey*, where they were impounded.

It was objected on the part of the defendant, that
the action was brought in the wrong county. Nothing contrary to the statute had been done in *Kent*.

(a) It is thereby enacted, that “no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is or shall be taken, except that it be to a pound overt within the same shire not above three miles distant from the place where the said distress is taken,”—upon pain of forfeiting for every such offence, an hundred shillings, and treble damages.

No offence had been committed in that county. The cattle were not out of the hundred of _____ till they were in *Surrey*; and there the venue ought to have been laid, this being a penal action (*b*).
1809.
Pope
v.
Davis.

On the other side, it was contended, that driving the cattle out of the hundred was one act; that this had been begun in *Kent*, though it was perfected in *Surrey*, and that the plaintiff had his option to sue in either county.

Lord ELLENBOROUGH ruled, that the venue was improperly laid; and the plaintiff was nonsuited (*c*).

Garrow and Lawes for the plaintiff.

Best, Serjeant, for the defendant.

[Attorneys, *Wild and Magnall*.]

(*b*) 21 Jac. I. c. 4. s. 1. enacts that actions for offences against penal statutes shall be brought in the county, city, &c. "wherein such offences shall be committed."

(*c*) So an action on 3 Geo. 2. c. 26. for selling coals as and for a sort of coals which they really are not, must be brought in the county in which the coals are delivered, and not where they were contracted for. But terfied q. t. v. *Windle*, 4 East,

385.—The most famous case in the books respecting the moment when an offence shall be taken to have been committed, is *Hales v. Petit*, Plowd. 253, where it became necessary to determine whether a man could be guilty of suicide in his own life time. Sir James *Hales* and his lady being joint tenants of a term for years, he drowned himself, and it was held that the term did not survive to her, but was forfeited to the crown; the

1809. the reasoning of BROWN, J. being considered irrefragable : for
 Popl v. Davies. he said, "Sir James Hales, was dead, and how came he to his death ? It may be answered, by drowning ; and who drowned him ? Sir James Hales." " And when did he drown him ? " In his life time. So that Sir James Hales, being alive, caused Sir James Hales to die ; and the act of the living man was the death of the dead man."

Wednesday
August 2.

REX v. MARTIN.

If an overseer of the poor receive from the putative father of a bastard child born within the parish, a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish.

THIS was an indictment against an overseer of the poor for rendering false accounts.

Amongst other instances of fraud, he was charged with having received 29*l.* to the use of the parish, which he had not brought to account. One *Morgan* being taken up as a putative father of a bastard child born within the parish, had paid the defendant the sum in question by way of composition with the parish for the maintenance of the child, and the defendant had given him a written receipt for it in these terms. The defendant made no mention of this money in his accounts ; but took credit for the expences of a journey in pursuit of *Morgan*.

Best, Serjeant, contended, on the authority of *Townson, v. Wilson* (*a*), that the defendant was not

bound to bring this sum to account.* The contract being illegal, the whole might have been recovered back, and the defendant himself would have been personally answerable for it to *Morgan*, even after paying it over and going out of office. The money, therefore, was not the money of the parish, and the parish was neither defrauded nor damaged by its being omitted in the overseer's accounts.

Lord ELLENBOROUGH.—The putative father could only have recovered back so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother. The parish bearing these expences, and being deprived of a fund legally applicable to them, was defrauded and damaged. Although the defendant would have been liable to *Morgan*, I am of opinion, that having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he is guilty of an indictable offence by thus attempting to put it into his own pocket.

The defendant was found guilty.

Garrow, Gurney, and Bolland for the prosecutor.

Best, Serjeant, Marryat, and Pitcairn for the defendant.

[Attorneys, *Crow and Dulow.*]

1809.

 Rex
v.
Martin.

Thursday,
August 10.

SCANDOVER and others v. WARNE.

In an action on a bail bond against one of the sureties, the declaration averred, that by a writ of latitat the sheriff was commanded to take "one Francis J., by the name of John J."— Held, that this averment was not supported by evidence of a latitat in the common form, commanding the sheriff to take John J.; altho' the bail bond was signed by the principal, "Francis J., arrested by the name of John J." and the plaintiff offered to prove that this person was their debtor, whom they meant to hold to bail.

THIS was an action on a bail bond. The declaration stated that the plaintiff sued out a writ of latitat, directed to the sheriff of Surrey, "by which said writ the said sheriff was commanded to take one *Francis Jones* by the name of *John Jones*, if he should be found in his bailliwick," &c. that the sheriff arrested the said *Francis Jones* by the name of *John Jones*, and that thereupon the defendant became bound for the appearance of *Francis Jones* arrested by the name of *John Jones* at the return of the writ.

Pleas; 1. *Nil debet*, to which there was a demur-
rer; 2. That the sheriff was not commanded by the
said writ of *latitat*, in the said declaration mentioned,
to take the said *Francis Jones modo & forma, &c.*; and 3.
That no such writ of latitat, as in the said
declaration mentioned, ever issued out of the court
of our said lord the King before the king himself,
against the said *Francis Jones modo & forma, &c.*
on which issues were joined.

An examined copy of a latitat was put in, commanding the sheriff to take *John Jones*; and the plaintiff's counsel drew the Judge's attention to the bail bond, which was thus signed by the principal, "Francis Jones arrested by the name of John Jones."

Lawes

Laws for the defendant maintained, that both issues must be found for him, as no evidence had been given of any command to arrest *Francis Jones*, or of any writ against this person having ever issued.

Marryatt contra, insisted, that it was enough if *Francis Jones* was the person really meant in the writ, and that this sufficiently appeared from the bail bond; and he offered to prove that the person who signed it as principal was the real debtor to the plaintiff, and the person they meant to hold to bail.

Lord ELLENBOROUGH.—The writ must speak for itself. I cannot hear that instead of A. B. mentioned in a writ, it was meant that the sheriff should arrest X. Y. It was lately decided that a justification in an action for false imprisonment under a writ issued against the plaintiff by a wrong name, could not be supported (*a*). The acknowledgement in the bail bond might be evidence against *Jones* himself; but it is immaterial to the issues joined on this record.

Plaintiff nonsuited.

Mariyat and Heath for the plaintiff.

Laws for the defendant.

(*a*) *Shadgett v. Chipson*, 8 East, 228. So an officer cannot justify taking the goods of A. B. under a distressing against C. B. averring that A. B. and C. B. are the same person. *Cole v. Hindson*, 6 T. R. 284.

CASES

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B.

At the Sittings after Michaelmas Term,

50 GEORGE III.

1809.

FIRST Sittings AFTER TERM AT WESTMINSTER.

Wednesday,
Nov. 29.

LAMBERT v. MARTHA ATKINS and another.

In an action
of debt on bond,
covertere is a
good defence
under a general
plea of *non est factum*.

DEBT on bond, dated 19th November, 1803.
Plea, *non est factum*, generally.

Garrow undertook to prove that at the execution of the bond, *Martha Atkins* was a feme covert, which fact, he contended, would entitle him to a verdict for both the defendants.

The Attorney-General for the plaintiff insisted, that *coverture* could not be given in evidence under the general plea of *non est factum*. Like *duress* and *per minas*, it must be pleaded specially, the *plea* concluding

cluding *et sic non est factum*. In *Cont. Dig.* “Pleader,” 2 W. 18. it is laid down, “if the obligor was a ‘monk, *feme covert*, &c. he may plead a special non ‘est factum.”

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v.
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and another.

Lord ELLENBOROUGH.—It is there said, that the defendant *may* plead coverture specially, not that it must be so pleaded. If a deed is executed by a married woman, it is absolutely void *ab initio*; and I have always understood the rule to be, that what shews the deed to be *void* is good evidence under the plea of *non est factum*, and that a special plea is only necessary where the deed is *voidable*. I have no hesitation in this case in receiving evidence of the coverture.

It was then proved that in the year 1790 *Martha Atkins* was married to a man of the name of *Meredith*, who shortly after went abroad; but there being no satisfactory evidence of his being alive within seven years, the plaintiff had a verdict.

The Attorney-General and Curwood for the plaintiff.

Garrow for the defendant.

[*Attornies, West and Bower.*]

Anon. 12 Mod. 609. *acc.* So under *non est factum* the defendant may give *lunacy* in evidence,

Yates v. Boen, Stra. 1104; or that he was made to execute the bond when *drunk*, *Cole v. Robbins.*

1809.

LAMBERT
v.
MARTHA
ATKINS
and another.

bins Bul. N. P. 172; or that it was delivered as an *escrow*, *Stoyles v. Pearson*, 4 *Esr* 255; or, generally, any thing which provas the deed to be *void at common law* at the time of pleading. *Pigot's case*, 11 *Co.* 27 a. But although a bond be absolutely *void by stat. a.*, as if made contrary to 23 H. 6. c. 10. or upon an usurpation in consideration, the obligor cannot take advantage of this under the general plea

of *non est factum*, but must plead the special matter, *Whelpdale's case*, 3 *res. 5 Co.* 119 a. And if one of two joint obligors, or two of three joint and several obligors be sued, the omission of the other is only matter in abatement, and no ground of nonsuit under the plea *et non est factum*. *Watts v. Goostran, Ld Raym.* 1160. *Stead. v. Moon, Cro. Jac.* 152. *Gaulton v. Chaliner*, 1 *Savnd.* 291 e.

Wednesday,
Nov. 29.

The parishes of A. and of B. being united by act of parliament for the maintenance of their poor, but for no other purpose; it is a fatal misdescription in ejectment, to state premises which are actually within the parish of A. as situate in the united parishes of A. and B.

GOODTITLE ex d. PINSENT v. LAMMIMAN.

EJECTMENT for certain premises described in the declaration as situate in *the united parishes of St. Giles in the Fields, and St. George, Bloomsbury.*

If appeared that these two parishes are united together by act of parliament for the maintaining of their poor, but for no other purpose; and that the premises in question stand in the parish of *St. George, Bloomsbury*.

Wigley for the lessor of the plaintiff contended, that a house standing in either of the two might well be described in pleading to be in *the united parishes of St. Giles and St. George*, as they were united at least for one very important purpose; and that the declaration might be considered as stating a demise of

of different premises, partly in the one parish and partly in the other, in which case it would be enough to shew that the premises sought to be recovered were in either.—But,

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GOODTITLE
ex d. PINEST
LAMMIMAN.

Lord ELLENBOROUGH held, that the variance was fatal; the declaration professed to give a local description of the premises, and stated them to be “in the united parishes of St. Giles in the Fields, and St. George, Bloomsbury,” as if these were completely blended together and formed only one parish; but in truth, they remained entirely distinct, except as to the maintenance of the poor.

Plaintiff nonsuited.

Wigley for the lessor of the plaintiff.

Garrow and *Espinasse* for the defendant.

[Attorneys, *Panton* and *Phillipson*.]

FINCHETT, Gent. one, &c. v. How and JARRATT.

Wednesday,
Nov. 20.

ACTION for business done as solicitor to a commission of bankrupt against one *John How*, sued out by the defendant *Jarratt*, and under which both defendants were chosen assignees. There were items in the plaintiff's bill for other business done for the defendants on their joint retainer.

An action for the expences of suing out and prosecuting a commission of bankrupt till the choice of assignees, cannot be maintained against the petitioning creditor and another person.

The

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FINCHETT

HOW AND
JARRATT.

The first question that arose was, whether the plaintiff could recover in this action for the expences which had been incurred in suing out and prosecuting the commission previous to the choice of assignees, it being enacted by stat. 5 Geo. 2. c. 30, § 25, that the creditor who shall petition for and obtain any commission of bankrupt, shall be obliged, *at his own costs and expences*, to sue forth and prosecute the same until an assignee, or assignees shall be chosen of such bankrupt's estate and effects; when the commissioners are to ascertain the said costs and to direct the amount to be paid to the petitioning creditor out of the first effects of the bankrupt to be received under the commission.

Jervis for the plaintiff contended, that both the defendants might, notwithstanding the statute, be liable for these expences in the present instance, if both had retained the plaintiff to sue out and prosecute the commission, and that the object of the clause was to save the creditors from incurring any liability by proving their debts if no effects should ever be received.

But Lord ELLENBOROUGH said, the words were express that the petitioning creditor should sue out and prosecute the commission till the choice of assignees *at his own costs and expences*, and that these costs and expences, therefore, could not be recovered in a joint action against him and another person. It might be an object with the legislature to confine the solicitor entirely to the credit of the person who came forward ostensibly as petitioning creditor, and to

to prevent commissions from being spied out except in cases where effects were likely to be recovered to defray the expence.

The next question was, whether a copy of the bill had been delivered pursuant to stat. 2 Geo. 2. c. 23. § 23.

It appeared that the defendants were not co-partners; but that in all the business included in the bill, *How* had taken the principal direction, and that a copy of the bill, signed by the plaintiff, had been delivered to him more than a month before the commencement of the action.

Park maintained that the plaintiff must be nonsuited, as a copy of the bill had not been delivered to each of the defendants, the words of the statute being, that an action shall not be commenced until the expiration of one month after the attorney shall have delivered "to the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house," a bill of his fees and disbursements.

Lord ELLENBOROUGH.—The act does not require personal service, and a delivery of the bill to an agent or joint contractor may be a delivery to the party or parties to be charged. If the person to whom the bill was delivered had not meddled with the business, though jointly liable with others who took the

1809.
FINCHETT
v.

HOW AND
JARRATT.

Where two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him to deliver a copy of his bill in pursuance of 2 G. 2. c. 23, to one of them, from whom he received his instructions and to whom the management of the business was left by the other.

Alliter of a delivery to that one who did not intermeddle; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill.

entire

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**FINCHEIT
v.
How and
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entire direction of it, I should hold that this was no delivery as to them. But the case is different where the bill is delivered to the person authorized by the other parties to act for them. One may reasonably suppose that he has authority to receive it, and that when received, he will communicate it to the others, and take the necessary measures for having it taxed. In the present instance, I am inclined to think that a delivery of the bill to *How* alone was a sufficient compliance with the statute (a).

Q. Whether an attorney can maintain an action for business done under a commission of bankrupt against the assignees, one month after he has delivered a copy of his bill, but before it has been taxed by a Master in Chancery?

(a) Vide *Crowder v. Shee*, 1 Campb. 437.

(b) Which is in these words,
 "And to the end that commissions of bankrupt may be carried on and prosecuted with as little expence as reasonably may be, be it enacted by the authority aforesaid, That all bills of fees or disbursements claimed or demanded by any solicitor, clerk, or attorney

"employed under any commission of bankrupt, shall be settled, adjusted, and certified by one of the masters of the court of Chancery; and so much as the master shall certify to be due to such clerk, solicitor or attorney, and no more, shall be paid by the assignee under such commission."

Park insisted that it was imperative upon the attorney to have his bill taxed before he made any claim or demand upon the assignees, who are directed to pay him so much as the master in chancery shall certify to be due, *and no more.*

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FINCHETT
v.
HOW AND
JARRATT.

Jervis submitted that the clause being in favour of the assignees, they were bound to take advantage of it, if they wished to do so, by having the bill taxed upon their own application, which in this case they had had a full opportunity of doing, a copy of the bill having been delivered to them above a month before the commencement of the suit.

Lord ELLENBOROUGH said, perhaps the meaning of the clause might be, that the estate should not be charged beyond the sum allowed by a Master in Chancery on taxing the solicitor's bill. Still, the assignees might have rendered themselves personally liable beyond that amount. They might be compelled to pay more; but they were not to pay more *as assignees*. The object of the legislature might be only to protect the interests of the creditors at large, leaving those who retain the solicitor to the common law liability arising from any contract they form with him, or any proceedings they may instruct him to institute.

The amount of the bill was then referred.

Jervis and *Reader* for the plaintiff.

Park and *Lowes* for the defendant.

FIRST Sittings AFTER TERM IN LONDON.

Doe v. Roe.

Thursday,
Nov. 30th.

When there are several counsel on the same side, and a junior has begun to examine a witness, the leader may interpose, take the witness into his own hand, and finish the examination. But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness by another counsel on the same side.

IN this case a question arose of considerable consequence to the bar.

There were two counsel for the plaintiff. The junior having called a witness who seemed disposed to shuffle and prevaricate, the leader interposed, and was proceeding to examine him.

The counsel on the opposite side contended that this was irregular, and that although where there were several counsel on the same side, they might, arrange among themselves by whom the witnesses should be examined; yet that when the examination of a witness was begun by one gentleman, the others had no right to put a question: they might privately suggest questions proper to be put; but could not address any directly to the witness: if this rule were not adhered to, a witness might be subject to the examination or cross-examination of as many barristers as were retained for the plaintiff or defendant, much time would be wasted, and great confusion would be introduced into proceedings at Nisi Prius.

Lord ELTONBOROUGH.—Convenience certainly requires that the examination of a witness should be carried on entirely by the gentleman who begins it; and several counsel clearly cannot be permitted to put questions to the same witness, one after another, in the manner apprehended. But I think the leading counsel has a right, in his discretion, to interpose, and to take the examination into his own hands. Very unpleasant consequences might follow if this were not allowed. If a gentleman, it being his first appearance in a court of justice, should be much embarrassed in the course of examining a witness, it would be hard if it were in the power of the opposite party to prevent his leader from stepping in to his relief. And other occasions may be imagined when it may be very important that the gentleman who conducts the cause should have the privilege of putting questions to a witness originally called by a co-adjutor. In the present state of the bar, there is no danger of this privilege being abused.

1809.

Doe

v.

Roe.

It would be curious to trace the steps by which the present mode of conducting trials at Nisi Prius, so well calculated for regularity, expedition, and the elucidation of truth, has been

gradually established. If we look back 200 years, we find all the counsel on both sides addressing the jury in turn, and the rules of evidence entirely disregarded or unknown.

1809.

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 Thursday,  
 Nov. 30.

In an action on a post-obit bond, it appeared that the attesting witness was an attorney who formerly had an office in London and resided at Sydenham.—

Held that it was not enough to let in evidence of his handwriting to prove the execution of the deed, that he had disappeared from his office in London for a twelve-month before the trial, and had not been heard of during that period by persons who knew him, without shewing that search had been made after him at the house he occupied at Sydenham.

But evidence of his hand-writing was admitted, on proof that a twelve-month ago, a commission of bankrupt had been sued out against him, to which he had never appeared.

## WARDELL v. FERMOR.

**D**EBT on a post-obit bond.—Plea, non est factum.

The execution of the bond was witnessed by *William Wrangham*, an attorney, who had an office in *Seething Lane*, and resided with his family at *Sydenham*.

*F. Williams* and *Paley* for the plaintiff said, they were not able to produce the attesting witness, nor could they give direct evidence of his being out of the kingdom; but they undertook to shew that he had disappeared, and that diligent search had been made for him without effect; which they contended would be sufficient to let in evidence of his handwriting. In *Cunliffe v. Sefton*, 2 *East*, 182, which was an action of debt on bond by an administratrix, evidence being offered that diligent inquiry had been made after one of the subscribing witnesses, and that no account could be obtained of such a person, proof was admitted of the hand-writing of the plaintiff, who was the other attesting witness. The subsequent case of *Crosby v. Percy*, 1 *Taunt*. 364. 1 *Campb*. 303, went still farther. There, evidence of the hand-writing of an attesting witness to the assignment of a lease was admitted, on proof of inquiry having once been made at his usual place of abode, when the person inquiring was told, that he had absconded to avoid his creditors. *MANSFIELD*, C. J. said the balance of convenience was in favour of extending the

the rule, and that more inconvenience would result from excluding the secondary evidence than from admitting it. Nor was this doctrine, as had been usually supposed, a modern innovation. In an *Anonymous Case*, 12 Mod. 607, which had been overlooked in the recent discussions upon this subject, Lord HOLT lays it down, that “in debtors bond, upon issue of *non est factum*, if the plaintiff prove the witnesses dead, beyond sea, or that he has made strict inquiry after them, and cannot hear of them, he shall be let in to prove their hands.”

**Lord ELLENBOROUGH.**—Upon these authorities I will admit the secondary evidence, if you shew that you could not by any means find out the attesting witness. But I will watch very narrowly your proof of search. This extension of the rule may lead to dangerous consequences. If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial with an account of his having absconded.

A person who had been clerk to Mr. Wrangham was then called, who stated that he had disappeared about a year ago, and had not since been heard of. Another witness swore that he had repeatedly called at Mr. Wrangham's late office in *Seething Lane*, without being able to learn any tidings of him. But no evidence was given of an inquiry having been made at the house he had occupied at *Sydenham*.

1809.

WARDLL  
v.  
FERMOR.

1809.

W.  
C. DELL  
v.  
FERMOR.

Lord ELLENBOROUGH said, it was possible he might have been shut up there all the time, and that his attendance might have been enforced by a subpoena.

The plaintiff's counsel then proved that a commission of bankrupt was taken out against *Wrangham* as a money scrivener, to which he never appeared.

*Wigley* for the defendant still insisted that this was insufficient. In *Cunliffe v. Sefton*, proof of the administratrix's hand-writing was admitted upon the supposition that the other attesting witness was a fictitious person. And in *Crosby v. Porey*, Sir JAMES MANSFIELD proceeded very much upon the particular circumstances of that case, saying that the proof of the assignment was mere matter of form. But the rule could not receive the same extension in an action on a post-obit bond, an instrument of a very suspicious nature, and requiring to be authenticated by some one present at its execution. Nor could the proceedings under the commission make any difference, as *Wrangham* might have been daily walking about the streets of the metropolis, although he did not surrender himself to the commissioners.

Lord ELLENBOROUGH.—I am disposed to treat whatever falls from the learned Chief Justice of the Common Pleas with the greatest respect; but I do not see how secondary evidence is to be admitted or rejected, according to the nature of the deed to be proved. It must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give. In this case,

I think the plaintiff has now laid a sufficient foundation for letting in evidence of the hand-writing. As *Wrangham* did not appear to his commission, I must presume that he was out of the kingdom. Had he been at *Sydenham* at the time fixed for his surrender, I must suppose that he would have surrendered to save himself from a capital felony.

The execution of the bond was then proved by evidence of *Wrangham's* hand-writing, and the plaintiff had a verdict.

*F. Williams* and *Paley* for the plaintiff.

*Wigley* for the defendant.

[*Attorneys, Vizard and Mills.*]

*N.* There was a suggestion in this case under 8 & 9 W. 3. c. 11, but it was considered quite superfluous.

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WARDLG  
v.  
FERMOR.

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 ADJOURNED SITTINGS AT WESTMINSTER
 

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1809.

Friday,  
Dec. 1.

POOLE v. BENTLY.

If an instrument professing to be an agreement for a lease, when taken altogether, appears intended to transfer possession and a present interest in the premises to the tenant, it will be treated as a lease, although it contain a stipulation for subsequently executing a lease under seal.

THIS was an action for use and occupation.

The plaintiff offered in evidence *as an agreement* an instrument, which had an agreement stamp, and of which the following is a copy :

" Memorandum of Agreement this 12th day of June 1806, between John Poole, Esq. of Highbury Terrace, in the parish of St. Mary, Islington, and Peter Bentley of Pancras Lane in the city of London, Mason, viz.

" The said John Poole hereby agrees to let unto the said Peter Bentley, and the said Peter Bentley agrees to take of the said John Poole, all that piece or parcel of land and premises thereon situate, &c. for the term of sixty-one years from Lady-day next, at the yearly rent of one hundred and twenty pounds, free and clear of all taxes, parliamentary or parochial, except landlord's property tax, the present land tax being redeemed, the said rent to be paid quarterly, the first quarter's rent within fifteen days after Michaelmas 1807; and that for and in consideration of a lease to be granted by the said John Poole for the said term of years, the said Peter Bentley agrees within

within the space of four years from the date hereof to expend and lay out in five or more houses, of a third rate or class of building, the sum of 2,000*l.* and the said John Poole agrees to grant a lease or leases of the said land and premises as soon as the said five houses are covered in; and the said Peter Bentley agrees to take such lease or leases, and to execute a counterpart or counterparts thereof, the said John Poole to take away all the glass of the green-house, &c. This agreement to be considered binding, till one fully prepared can be produced.

John Poole,  
Peter Bentley.'

*Park* for the defendant objected, that this instrument operated as a present demise, and ought to have been stamped as a lease.

*Garrow, contra,* contended that the whole tenor of the instrument shewed it to be only an agreement for a lease—which appeared decisively from the stipulation on the part of the plaintiff, to grant a lease or leases of the premises, and on the part of the defendant, to execute a counterpart or counterparts thereof. He relied upon *Goodtitle d. Estwick v. Wcy*, 1 T. R. 735, as expressly in point.

**Lord ELLNBOROUGH.**—I am of opinion that this paper passes a present interest in the land, and operates as a demise. The lease or leases afterwards to be granted are only by way of further security. Present possession is given, houses are to be built, and the agreement is to be binding till another is executed.

1809.

POOLE

v.

BENTLEY.

**1809.** I therefore cannot receive the paper in evidence, unless stamped as a lease.

**Poor.**

**v.**

**BENTLEY.** Plaintiff nonsuited.

The case afterwards came before the Court of K. B., and the Judges being all of opinion that the instrument was a lease, a rule nisi that had been granted to set aside the non-suit, was discharged.

*Garrow and Stork* for the plaintiff.

*Park and Reader* for the defendant.

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*Vide Roe v. Ashburner, 5 T. R. 163, and Barry v. Nugent, there cited.*

Saturday,  
Dec. 2.

**Hongson q. t. v. FLOWER.**

A licensee hawker who gives his licence to be used by his servant employed to sell goods on his account, is not liable on 29 C. 3, c. 26, as for letting to hire or lending the licence.

**D**EBT on 29 C. 3, c. 26, s. 13. (*a*) to recover a penalty of 40*l.*

(*a*) The statute enacts "that in case any person shall let out to hire or lend any licence to him or her granted as aforesaid, or shall trade with, or under colour of any licence granted unto any other person whatsoever, or of any licence in which

his or her own real name shall not be inserted as the name of the person to whom the same is granted, the person letting out to hire or lending any such licence, and the person so trading with or under colour of any licence granted to any other person,

The first count of the declaration stated that the defendant, being a hawker and pedlar and petty chapman, and having a licence subscribed by two of the commissioners for the time being for licensing hawkers, dealers, and petty chapmen, granted to him to travel and trade with two horses from town to town, &c. did unlawfully *let out to hire and lend* the said licence so to him granted, to wit, to one *Benjamin Worby*, the term for which the same was granted not being expired; contrary, &c. The second count alleged that the defendant did unlawfully *lend* the licence.

It appeared that the defendant is a coal merchant in St. Catherine's near the Tower, and that he was in the habit of employing *Worby* as his servant to sell coals about the streets from a waggon having his (defendant's) name painted upon it, and drawn by his horses. *Worby* received a commission of 4s. 6d. a chaldron upon the coals he sold; and such as he could not dispose of, he brought back to the defendant. If he gave credit to any person it was at his own risk, as he was always obliged to pay, upon his return home, for all that were sold. Upon these occasions *Worby* carried about with him a licence, which his master had taken out in his own name, and had delivered to him for the purpose of protecting him.

person, or any licence in which his or her own real name shall not be inserted as the name of the person to whom the same

is granted, shall each of them forfeit the sum of 40l. to be recovered," &c.

The

1809.

HODGSON  
v.  
FLOWER.

1809.

HODGSON

v.

FLOWER.

The *Attorney-General* insisted that the defendant had incurred the penalty by thus handing over his licence to *Worby*. The object of the statute was, to prevent any person from having the opportunities of committing robbery and fraud enjoyed by hawkers and pedlars whose character had not been investigated and vouched for. This appeared clearly from the sixth section, which enacts, that before any person shall be entitled to receive any licence to trade or travel as a hawker or pedlar, he shall produce to the commissioners a certificate signed by some one, clergyman officiating within the parish or place with in which he has his usual place of residence, and also by two reputable inhabitants of the said parish, or place, attesting that he is of good character and reputation, and is a fit person to be licensed to exercise the trade of a hawker, pedlar, and petty chapman. But this clause would be rendered entirely nugatory, if a man, under colour of licences granted in his own name, could send out his servants, who might be men of the most infamous character. The licence was personal, and could only be used by the person to whom it was granted.

*Garrow, contra*, maintained that the act went no farther than to forbid the lending or letting to hire of a licence, to be used by another as a separate trader, and for his own advantage. *Worby* here represented the defendant, and the licence might be considered as having been all the while in the defendant's possession. If the person to whom a licence was granted should be taken ill, could it be contended that he

he might not send out his servant with his cart and horses to sell his goods until his recovery? The meaning of the legislature could not be that the hawker should be chained like the drag-staff to his cart. There was a sufficient security for the servants in the character of the master, and he was responsible for their acts.

**Lord ELLENBOROUGH.**—The declaration states that the defendant *let* the licence to hire, and that he *lent* it. We must, therefore, consider whether he did either the one or the other; not whether what he actually has done ought or ought not to have been prohibited by the legislature. It appears to me that in sending out his servant to sell coals with the licence, he neither let it to hire nor lent it. He cannot be said to have let it to hire, having received no hire or reward for parting with it. *Worby*, instead of hiring, was himself hired. Nor can this be considered a lending. Lending may be defined a gratuitous bailment of a chattel to be used for the benefit of the person to whom it is delivered. Here, the supposed borrower does not derive the benefit arising from the use of the licence. The coals were sold on the defendant's account, and he received the profits of the sale. *Worby's* commission can only be considered as the wages of his labour. Perhaps the licence was no protection to him, and in that case he might have been himself prosecuted for trading as a hawker, without, or under colour of, a licence: but I clearly think that no forfeiture has been incurred by the defendant. The certificate certainly looks as if the legislature

1809.

HODGSON  
v.  
FLOWER.

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v.  
FLOWER.

legislature had meant that the licence should be personal; but this conjecture cannot extend a penal statute beyond the limits pointed out by the enacting clause, or render a delivery of the licence to be used for the benefit of the owner, a lending or letting to hire. From a communication I have had with the CHIEF BARON of the Exchequer, I find that a case like the present occurred a few years ago in that Court (*a*). It having been ruled at Nisi Prius that the action could not be maintained for sending out a servant with the licence, a new trial was moved for; but the BARONS were all of opinion that the case did not come within the act of parliament. I should hold myself bound here by that authority; and it perfectly corresponds with my own opinion.

Plaintiff nonsuited.

The *Attorney-General* and *Gurney* for the plaintiff.

*Garrow* and *Lawes* for the defendant.

[Attorneys, *Ledwick* and *West*.]

(*a*) *Chamberlain q. t. v. Hill*, H. T. 44 G. 2.

EVANS q. t. v. HUNTER.

Monday,  
December 4.

**D**EBT on 5 Eliz. to recover 30*l.*, which the declaration alleged the defendant had forfeited by employing in the business of a carpenter for 15 months from the 18th day of May 1808, one J. H. who had not served an apprenticeship to the said trade. Plea, *nil debet.*

It appeared that the defendant had employed J. H. in the manner alleged, from the 18th of May 1808 to the 15th of September 1809. The declaration was entitled generally of Michaelmas Term, 50 Geo. III. and the writ was not given in evidence.

In an action on 5 Eliz. for setting to work a journeyman who has not served an apprenticeship, the plaintiff cannot recover any penalty that had been incurred a year before the commencement of the suit, although the defendant continued to employ the same journeyman within the year.

*Juris* for the defendant contended, that his client could not be liable in this action for employing the journeyman before the 6th of November 1808. The statute imposed a penalty of 40*s.* a month for setting to work a person who had not served an apprenticeship. Therefore each month that this was done constituted a distinct offence, and by 31 Eliz. c. 5. § 5, all actions brought for any forfeiture upon a penal statute, the benefit whereof is limited to the king and the prosecutor, must be brought within one year after the offence is committed.

It was suggested on the other side, that the employment of this person from June 1808 to September 1809, was a continued act, and that the statute therefore

**1809.** fore did not begin to run till the 15th of September 1809.—But

**EVANS**

**HUNTER.**

LORD ELLENBOROUGH said the statute was a bar to all the penalties that had accrued before 6th November 1808, and the plaintiff had a verdict for those that accrued subsequently.

*Garrow* and *Lawes* for the plaintiff.

*Jervis* for the defendant.

Attorneys, Chippendale and *J. S.* [.]

It is, perhaps, fortunate that there is not much inducement from pecuniary considerations to bring an action on this sta-

tute, as the plaintiff cannot recover for his own use more than £27. and he must pay his own costs.

Wednesday,  
December 6.

### WATSON v. PRARS.

**T**HIS was an action on the case for the infringement of a patent.

The patent bore date 10th May 1808, and contained the usual proviso, that a specification should be im-

rolled “within one calendar month next and imme-

diately after the date thereof.” The specification was im-

rolled on the 10th of June following.—Held that the month did not begin to run till the day the patent, and that the specification was in time.

“ diately

"diately after the date thereof."---The specification was not inrolled till the 10th of June following,

*Park* for the defendant insisted that the patent was void, the specification not having been inrolled on or before the 9th of June, when one calendar month from the date of the patent expired. The month must begin to run from the 10th of May, and included the whole of that day. It therefore could not extend to the 10th of June, there being a clear impossibility of two days of the same number being comprehended in one calendar month.

*Schwyn, contra*, relied upon Thomas v. Popham, M. & Eliz. Dyer 218 b. Moore, 40. S. C. The question arose there upon the statute of inrolments, 27 H. 8. c. 16, which enacts "that the inrolment shall be made *within six months next after the date of the deed.*" The indenture in issue bore date, 9th October 1557; it was inrolled in chancery on the 21st of March 1558, which was the last day of the six months, reckoning 28 days to each month, and making the day of the date *exclusive*. The COURT held, that the indenture was well inrolled, and that the words "next after the date of the deed" were exclusive of the day of the date.

*Park* in reply, urged, that in that case the Court was bound, if possible, to support the validity of the deed against the grantor, who was a subject; but that the grant here being by the king, was liable to a different rule of construction, and that it had been often decided

1809.

WATSON  
v.  
PEARS.

1809.

WATSON  
vs.  
PEARS.

decided that where a period was to be reckoned from a date, the day of the date was inclusive.

**Lord Ellenborough.**—It used to be held that “from the date,” includes the day, and “from the ‘day of the date,’ excludes it. But since the case of *Pugh v. The Duke of Leeds* (*a*), these formal distinctions have been done away; and the rule of good sense has been established, that such words shall be construed according to the meaning of the parties who use them. The case cited upon the statute of enrolments I think is expressly in point. That shews that the day on which the patent bears date is not to be reckoned. The month therefore began on the 11th of May, and included the 10th of June, the day on which the specification was enrolled.

The defendant afterwards had a verdict on the merits.

**Garrow and Selwyn** for the plaintiff.

**Park and Comyn** for the defendant.

[*Attorneys, Sloper and Hamilton.*]

(*a*) Cwp. 714.

But where the computation of time is to be made from an *act done*, the day on which the

*act is done* is to be *included* in the reckoning. *Castle v. Burditt*, 3 T. R. 623. *Glassington v. Rawlius*, 3 East, 407.

FAUNTON v. WABORN, Esq.

Pl. 173.  
December 3.

**T**HIS was an action for criminal conversation.

To prove the marriage between the plaintiff and his wife, a clergyman was called, who swore that he had performed the ceremony in the *Chapel Royal* in the Tower of London; and a copy of the register was put in, stating the parties to have been married there in the year 1804. But this clergyman, who belonged to a distant parish, did not know whether marriages had been usually solemnized, and banns proclaimed in the chapel in question; and, at first, no register or banns was produced.

It was for the defendant to meet, that the plaintiff's marriage appeared to be invalid for the stat. 20 C. 2. c. 53, which enacts, that all marriages solemnized in any other place than a church or public chapel where banns have been usually published, unless by special licence from the Archbishop of Canterbury, shall be void. No evidence being given of the publication of banns in this chapel, the Judge must presume, that it was like the chapel in the *Saroy*, or the chapels in the *Hous of Court*, in which banns had not been usually published before the passing of the marriage act, and in which marriages cannot now be legally solemnized.

Lord ELLENBOROUGH seemed to consider the objection as well founded; but said he would allow the

1809.  
TAINTON  
v.  
WYBORN.

trial to proceed, so that the plaintiff might in the mean time send to the Tower of London to make inquiries concerning this chapel.

Some time after, the parson attended who regularly officiates there, and produced a register of marriages, going back to the year 1578, and a register of the publication of banns from the year 1754, when the marriage act passed. He likewise stated, that while he had known the chapel, marriages had been frequently performed in it, and banns proclaimed.

Park still objected, that the evidence was insufficient; as notwithstanding any thing that had been proved, banns might never have been proclaimed in this chapel before the passing of the act.

Lord ELLENBOROUGH.—As banns appear to have been frequently published here ever since the passing of the marriage-act, I will presume that they were so before. The register produced begins with the year 1754; but this circumstance is accounted for by its being necessary then to begin a new register of this sort according to the form prescribed by the statute. Banns were most probably published previously, and entered in a different register, or perhaps not registered at all. Sufficient evidence is now adduced to found the presumption. However, I consider this only as a *prima facie* case; and I am ready to receive evidence, that before the passing of 26 G. 2. c. 33. banns were not usually proclaimed in this chapel. In cases of this sort, where the marriage has

has been solemnized in a chapel, I hope the plaintiff will come prepared with the registers and other evidence to shew that banns are now, and have been usually published there. Without some foundation of this sort, I cannot form any presumption that it is a chapel in which marriages may be lawfully solemnized according to the provisions of the marriage act.

The plaintiff had a verdict.

*The Attorney-General, Garrison, and Dumper* for the plaintiff.

*Park and Marryatt* for the defendant.

[*Attorneys, Blake and Patt*]

In *Rex v. Northcote, 1. Doug* 658 the court of K. B. determined that by "a public chapel in which banns have been usually published," the legislature meant a chapel existing at the time when the marriage act passed, and in which banns had then been usually published; and consequently, that a marriage solemnized in a chapel erected since 26 G. 2. is void, although banns have been frequently pub-

lished and marriages *de facto* so-  
lemnized there from the time of  
its erection. But as in my mar-  
riage, from ignorance and inad-  
vertence, had been solemnized in  
such chapels, acts have from  
time to time been passed to ren-  
der them valid under certain  
restrictions, and to exempt the  
officiating clergymen from the  
penalties they had incurred.  
See 21 G. 3. c. 53, 41 G. 3.  
c. 77, and 48 G. 3. c. 127.

1809.  
TAYLOR  
W. W.  
W. W.

THE LAW REPORTER

## ADJOURNED TRIALS IN LONDON

— — — — —

Tuesday,  
Dec. 12.

### WILLIAMS v. TATE

A minor note  
to add with the  
meaning of the  
bankrupt laws  
by which a  
partner is not  
held personally  
for what he w<sup>s</sup>  
obliged to do  
as  
sure and due,  
he himself being  
proprietor of  
the building  
in question,  
public bath in  
ground of which  
he was joint  
partner.

This was an appeal received by the Lord Chancellor, to try whether or not Williams was a bankrupt on the 2d November, 1841, which depended upon the question, whether he had previously been a trader within the meaning of the bankrupt laws.

The affirmative was conceded from the plaintiff's having erected a public theatre and baths at Southend. It was agreed that there was a contract between him and a company for the building a theatre at Southend, it was to be built in share — one of the partners was to have the right to hire the materials for the construction, and that he was to be paid for it by a weekly rate. This agreement was a sufficient caution — The plaintiff likewise erected the bath, but he was joint tenant in fee of the spot where they stood, which had been granted to him and another person for this purpose by the lord of the manor.

Lord Exeterborough ruled, that Williams was not within the bankrupt laws by reason of either of these transactions, and said, that a building on a man's

man's own land, for whatever purpose, could not be considered a buying and selling.

1809.

WILLIAMS

v.

STEVENS.

### Verdict for the defendant (*a*).

One of the witness—*Lyon*—examined on the *voire dire* appeared to have a considerable demand upon the plaintiff for the land sold, which he had not paid under the commission.

A creditor of a bankrupt who has not proved his debt under the commission is competent witness to support the commission, although not to increase the estate.

It was contended that *Giles* is an incompetent witness; as he came to inspect the commission, under which he was to receive a dividend.

Lord ELLENBOROUGH.—A creditor is clearly an incompetent witness to make use the fund out of which he may receive a dividend; but I do not see why he should not be allowed to prove what barely goes to support the commission, of which he has not availed himself. It may be of no small advantage for him to be allowed to sue his debtor as a servant person,

(a) See all the cases upon this subject, collected in *Sutton v. Weeley*, 7 East, 442, in which it was at last settled, that the proprietor of a brick ground

may sell it there for sale, with a view to profit, is not a trustee of a bankrupt, unless although he purchases the land used for making the bricks.

1809.

WILLIAMSvs.  
STEVENS,

as to receive a dividend under a commission of bankrupt sued out against him.

The witness was examined (*b*).

*Garrow and Marryatt* for the plaintiff.

*The Attorney-General and Lanc* for the defendant.

[*On the Plaintiff's Case]*

(*b*) A creditor with  
just cause of action  
against a bankrupt  
is entitled to receive  
a dividend out of the  
bankrupt's allowance, and  
by so doing the creditor  
shall not be liable to  
the bankrupt.  
But a creditor who  
sold his debt at a loss  
is not entitled to re-  
port the same.

being gone. *Granger v. Fur  
ton* & *Sir Wm. Bl. R.* 27.  
And in all cases, the incompe-  
tency of the creditor may be  
raised, by increasing the  
amount, without a release to  
*Ambrose v.  
Lanc.* *Cas. Term. Hudw.*  
*v. Chipping Safford*.

Wednesday  
Dec. 13.

*Gaudon v. MARY ROBSON.*

**A**CTION by the drawer and payee of a bill of ex-  
change against the acceptor.

The declaration stated that the plaintiff drew the  
bill by the name, style, and firm of *Gaudon and  
Hughes*.

received a fixed salary. Held that in action on a bill of exchange payable to  
firm, the clerk must be joined as a plaintiff.

It

A merchant  
carrying on trade  
on his own or  
private account,  
introduces into  
his shop the  
name of a clerk  
who has no par-  
ticipation in  
profits or loss,  
but continues to  
the order of the

It appeared that the plaintiff traded under the firm of *Guidon and Hughes*, mentioned in the bill; that he has no partner who participates in the profits of his business; but that he has a clerk of the name of *Hughes*, at a fixed salary, who is held out to the world as his partner, and is generally considered as such.

1809.

GUIDON  
v.  
ROSSON.

The *Attorney-General* contended that *Hughes* didn't to have been joined as a partner in this action. The defendant contracted, not with the plaintiff singly, but jointly with him and *Hughes*. She came prepared to shew that she never accepted any bill drawn individually by *Guidon*. She might have a defence to an action on a bill drawn by the partnership; but she had no reason to imagine that the bill declared upon was of *Guidon's* signature. Suppose she had a debt due to her from the firm, how could she set it off in this case? Payment to *Hughes* would clearly have been a general payment of the bill; and a release from him would not extinguish the debt. He was liable to *Guidon*'s creditors; and as to all those who dealt with *Guidon*, he was a contracting party as much as if there had been an equal participation of profit and loss between the two.

*Park, contra*, insisted that the case stood exactly the same as if there had been no such person as *Hughes in rerum natura*. The names in a firm are quite immaterial. Firms sometimes continue unchanged for generations, and when the names of the real partners no longer correspond with any of those

1809.

*Guilson v.  
Robson.*

ostensibly used. Persons who deal with the firm, therefore, contract only with those really composing the partnership. It is very common for men, trading by themselves to add & *Co.* to their names, and if instead, they added the name of another person who had no share in the business, the legal effect must be the same. The plaintiff alone had the beneficial interest in the bill, and he had, therefore, a right to sue upon it by himself. The defendant was not injured. The declaration gave her full notice of the bill on which the action was brought, and if she had a set off, she might give it in evidence.

Lord ELLENBOROUGH.—There being such a person as *Hughes*, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm, for the purpose of gaining credit. But where the name of a real person is inserted, with his own consent, it matters not what agreement there may be between him and those who share the profit and loss. They are equally responsible, and the contract of one is the contract of all. In this case, the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person. The variance is fatal.

Plaintiff nonsuited.

*Park*

*Park and Maryatt* for the plaintiff.

1809.

The *Attorney-General* for the defendant.

GUIDON  
v.  
ROBSON.

[*Attorneys, Dates and Places*]

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*Lord Waugh v. Carver*, 2 H. Bl. 235. *Peacock v. Peacock*,  
ante 4.

*Jones and another v. Mars and another.*

Thursday,  
Dec. 14.

**I**NDORSEES against drawers of a bill of exchange.

In an action against the drawer of a bill of exchange the declaration stated, that the defendants made the bill, "their own hands being thereunto subscribed." In fact, their firm of "A. & Co." was subscribed to the bill.—The Judge refused to allow for the variance.

The declaration stated that the defendants "made their certain bill of exchange in writing, their own proper hands being thereunto subscribed."

The bill when produced appeared to be drawn in the defendant's firm of "*Mars & Co.*"

*Laws* objected that this was a fatal variance. It would have been enough if the declaration had alleged that the defendants drew the bill according to the custom of merchants, or it might have added "by the stile and firm of "*Mars & Co.*" or "the stile and firm of *Mars & Co.* being thereunto subscribed." But to support the declaration as actually framed,

1809.

Jones  
 and another  
 v.  
 Mars  
 and another.

framed, it would be necessary to produce a bill signed by both the defendants as drawers. Bills must be so drawn, if there are two drawers who are not in co-partnership (*a*), and the bill declared upon must be taken to be of this description. This was like a case before his Lordship two or three years ago, where, in an action against the drawer of a bill of exchange, the declaration stated that the defendant's *own proper hand* was therunto subscribed, and it turned out that the bill was drawn by *procuration*; whereupon the plaintiff was nonsuited.

Lord ELLENBOROUGH.—It was impossible to say that the hand of the agent who signed the bill by procuration was the principal's own proper hand. But here the proper hand of one of the defendants is subscribed to the bill. The only difficulty is, that the word is in the plural. Had it been "their own proper hand," I should have clearly held it sufficient. As it stands, I entertain some doubt; but I will not nonsuit. Perhaps the *s* may be rejected as surplusage, or part may have been written with one hand and part with another. The defendant could not have been led into any mistake as to the bill sued upon.

A bill of exchange expressed on the face of it to be "for value delivered," is stated in pleading to be "for value received." This is not a material variance.

The bill was stated on the declaration to be "for value *received* in leather." On the face of it, the bill was expressed to be "for value *delivered* in leather." An objection being taken on this point,

MICHAELMAS TERM, 50 GEORGE III.

amount of 300*l.* and that the note declared upon was given by Walker in satisfaction of this debt.

Si

**Lord ELLENBOROUGH.**—I think your remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note. How can I say that a note made and signed by one in his own name is the note of him and another person neither mentioned nor referred to?

WALKER  
and  
ROWLESTONE

*Park* contended that the note was set out in the declaration according to its import and legal effect; that Walker had authority to bind Rowlestone for this debt, and that the presumption of law was that he had done so, although Rowlestone's name was not introduced. It was universally acknowledged that any number of partners might be bound by a note drawn in the partnership firm; and the legal consequence must be the same if a note be given for a partnership debt, whether the phrase *or Co.* be employed or not.

**Lord ELLENBOROUGH.**—The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt.

Plaintiff nonsuited.

*Park and Holroyd* for the plaintiff.

The *Attorney-General* for the defendant.

, [Attorneys, Gatty and Street.]

*Vide* Mason v. Rumsey, 1 Campb. 384. Lord Galway v. Matthew, *Ib.* 403.

CASES AT NISI PRIUS.

1  
hersday,  
Dec. 14.

If the drawer of  
a foreign bill of  
exchange had  
no effects in the  
hands of the  
drawer, and had  
no assignable  
grounds to ex-  
pect that the  
bill would be  
honored, a  
protest is un-  
necessary to  
charge the  
drawer.

LEGG v. THORPE.

**T**HIS was an action by the plaintiff as indorsee of a foreign bill of exchange drawn by the defendant in Canada, upon *C. B. Wyatt* in this country.

The plaintiff gave the usual evidence in support of such an action, except the *protest*. To obviate the necessity of this, *Wyatt* was called, and swore that he had no effects of the defendant in his hands, and that the defendant had no right to expect that upon any consideration he would accept or pay the bill.

*Park* for the defendant insisted that the rule was peremptory and universal, which required that there should be a protest, in the case of a foreign bill, to charge the drawer, and that for want of this the plaintiff must be nonsuited.

*Garrow, contra*, maintained that a protest was merely the mode of giving notice in the case of foreign bills, and was altogether unnecessary where no notice was required.

*Park* distinguished between inland and foreign bills, and contended that the latter must be guided by the general law of merchants upon the subject received in other countries; according to which, a protest is invariably required to charge the drawer.

Lord ELLENBOROUGH regretted that notice had ever been dispensed with in any case; but said he did not see how it was more necessary in the case of foreign than of inland bills; and if *notice* was unnecessary, so was a *protest*, which was only the formal mode of giving notice to the drawer and indorsers of foreign bills. The protest could not be considered an essential part of the custom of merchants upon this subject. There might be cases where although the drawee had no effects of the drawer in his hands when the bill was presented for acceptance or payment, the drawer of a foreign bill might notwithstanding be entitled to notice, and where a protest would in consequence be requisite; as if a bill were drawn in respect of consignments sent to the drawee, or on the credit of any fund which might reasonably be expected to prove available. But here the drawer knew from the beginning that the bill would be dishonoured, and no detriment could happen to him from being left ignorant of the precise date of its dishonour. His lordship however expressed a wish, that as the point was of great importance, the opinion of the court should be taken upon it.

Accordingly a verdict was entered for the plaintiff; and in the ensuing term a rule was granted to shew cause why a nonsuit should not be entered; but cause being shewn, the rule was discharged, the whole court being of opinion that as the defendant had no right to expect that the bill would be honoured by the

180  
oG.  
—  
v. P. IN  
THORPE

<sup>10.</sup> drawee, he was not entitled to notice, and that a protest was therefore unnecessary.

Attornies.

*Garrow and F. Pollock* for the plaintiff.

*Park and D. Pollock* for the defendant.

[*Attorneys, Wild, son, and Taylor*]

*Vide Bickerdike v. Bolman*, 1 T. R. 402. *Rogers v. Stephens*, 2 T. R. 713. *Gibbon v. Coggon*, *ante* 168.

Thursday,  
Dec. 14.

TAMPLIN AND ANOTHER, Assignees of Visick, a Bankrupt, *v.* DIGGINS and ANOTHER.

ACTION for money had and received, to recover the sum of 324l. paid by Visick to the defendants after an act of bankruptcy.

The defendants are bankers at *Chichester*, and were in the habit of drawing bills for the accommodation of Visick who carried on business at *Midhurst*. He committed an act of bankruptcy on the 18th of Aug. 1808. At that time there were bills running of the nature above mentioned, which were not due till after the

Bankers having acts of bills for the accommodation of a trader, after committing an act of bankruptcy, but before a commission is sued out, lodge money with them to take up the bills, which do not become due till after a commission is sued out, and are then regularly paid by the acceptors. Held that they were bound

to refund this money to the assignees, and that they neither had a right of set off under 5 G. 2, c. 30; nor could protect themselves under 19 G. 2, c. 12, as having rec'd payment of bills of exchange in the ordinary course of trade.

the 24th of September. On the latter day a commission of bankrupt was sued out against Visick. The money in question was paid in by him on and after the 24th of August, for the purpose of taking up these bills, which have since been paid by the defendants.

*Garroo* contended first, that the defendants had a right of set off under 5 G. 2. c. 30. s. 28. which enacts that where there shall appear to have been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, one debt may be set against the other, and what shall appear to be due on either side on balance of such account, and no more, shall be claimed or paid respectively. Here were mutual debts, and there had been a long course of mutual credit. But upon taking an account, the balance was in favour of the defendants. The action, therefore, could not be maintained.

**Lord ELLENBOROUGH.**—The money not being paid in till after an act of bankruptcy, it was not the bankrupt's money, but the money of his assignees. He trusted the defendants with what was not his own. The statute is expressly confined to mutual credit and mutual debts *at any time before such person became bankrupt*. The *32d* was always a debt due to the assignees, and cannot be set off against a debt due from the bankrupt.

*Garroo* next claimed to retain this sum of money under 19 G. 2. c. 32. s. 1. whereby it is enacted

1806.

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TOMES  
and another  
v.  
DICKVS  
and another.

1809.

—  
T. IMPLIV  
and another  
v.  
DICKINS  
and another.

"that no person who shall be really and *bona fide* a creditor of any bankrupt for or in respect of any bill or bills of exchange really and *bona fide* drawn, negotiated, or accepted by such bankrupt in the usual and ordinary course of trade and dealing, shall be liable to refund or repay to the assignees of such bankrupt's estate any money, which before suing forth the commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand or have notice, that he is become a bankrupt, or that he is in insolvent circumstances." The defendants in this case clearly were the *bona fide* creditors of the bankrupt in respect of bills drawn in the usual course of dealings between the parties and as they had received the money before the date of the commission, and before they had notice of *Visick* having committed an act of bankruptcy or being insolvent, they could not be liable to refund it to the assignees.

LORD ELLINBOROUGH.—I doubt whether these bills can be said to have been drawn in the usual course of trade and dealing within the meaning of the statute. At any rate, as the bills were still running at the date of the commission, this money was not received by the defendants in the usual and ordinary course of trade and dealing. The payments protected, are payments upon bills actually due. The sum in question was deposited with the defendants, not in payment of a present debt, but to satisfy a demand

demand which did not arise till after the suing forth of the commission.

Verdict for the plaintiffs, which was afterwards confirmed by the Court of K. B.

1809.  
 TAMPLIN  
 and another  
 v.  
 DICOINS  
 and another.

*Gurney and Runnington* for the plaintiffs.

*Garrow and Taddy* for the defendants.

[*Attorneys, Russell and Ellis.*]

*Vide Vernon v. Hall*, 2 T. R. 648. *Pinkerton v. Marshall*, 2 H. Bl. 331. *Bradley v. Clarke*, 5 T. R. 197.

Stat. 19. C. 2. c. 32. can now come in question only where the payment is *within two months* of the suing out of the commission, Sir S. Romilly's Act. 46 G. 3. c. 135. § 1. having

rendered valid and effectual, notwithstanding any secret act bankruptcy, all conveyances by all payments by and to, and all contracts and other dealings and transactions by and with any bankrupt, bona fide made or entered into *more than two calendar months* before the date of the commission.

### BOWMAN v. MANZELMAN.

Saturday,  
Dec. 16.

### CTION for seaman's wages.

It appeared that the defendant had agreed to pay the plaintiff 7*l.* a month; but that there were ship's articles, which the plaintiff afterwards signed.

In an action for seaman's wages, the plaintiff may under 2 G. 2, c. 86 give evidence of the contents of the ship's articles, without having served a notice to produce them.

1809.  
~~~~~  
BOWMAN
v.
MANZEL-
MAN.

It being objected that the articles should be produced, statute 2 Geo. 2. c. 36. s. 8. was cited, whereby it is enacted, that "no seaman or mariner, by entering into or signing such contract or agreement shall be deprived of, or hindered from using any means or methods for the recovering of wages against any ship, the master or owners thereof, which he may now lawfully make use of, and that in all cases where it shall or may be necessary that the contract or agreement in writing should be produced in court, no obligation shall lie on any seaman or mariner to produce the same, but on the master, owner or owners of the ship, for which the wages shall be demanded; and no seaman or mariner shall fail in any suit, action, or process for recovery of wages for want of such agreement or contract being produced, &c."

The defendant's counsel still insisted, that according to the invariable rule of law, the mariner was bound to give the captain notice to produce the articles before entering into parol evidence of their contents, and that the object of the legislature must be understood to have been, to impose the obligation of producing them upon the captain or owners, after receiving such notice, in whose custody soever they might be.—But,

Lord ELLENBOROUGH held, that the statute introduced an exception to the general rule upon this subject; and required the captain, without notice, to produce the articles at the trial, if he would found any objection

objection upon them, or resort to them for any purpose whatever in making his defence.

The plaintiff had a verdict without the articles being produced.

The *Attorney-General*, *Park*, and *Espinasse* for the plaintiff.

Garrow and *Wigley* for the defendant.

[*Attorneys, Rippingham and Willitt.*]

2 G. 2. c. 36. § 1. requires that the agreement for seamen's wages shall be in writing, and thus written document is neces-

sarily in the custody of the master or owners of the ship. See Abbott on Shipping, Part IV. c. 1.

STILK v. MYRICK.

Saturday,
Dec. 1.st

THIS was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid

come due to them among the remainder of the crew. This promise is void for want

Y 3

at

In the course of a voyage, if one of the crew die, or desert, and the captain is unwilling able to find others to supply their place, promises to divide the wages which would have been of consideration.

1809.

SILKv.MYRICK.

at the rate of 5*l.* a month ; and the principal question in the cause was, whether he was entitled to a higher rate of wages.—In the course of the voyage, two of the seamen deserted, and the captain having in vain attempted to supply their places at *Cronstadt*, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them, if he could not procure two other hands at *Gottenburgh*. This was found impossible ; and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at *Cronstadt*.

Garrow for the defendant insisted, that this agreement was contrary to public policy and utterly void. In West India voyages, crews are often thinned greatly by death and desertion ; and if a promise of advanced wages were valid, exorbitant claims would be set up on all such occasions. This ground was strongly taken by Lord KENYON in *Harris v. Watson, Peak. Cas. 72.* where that learned judge held, that no action would lie at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship ; and his lordship said, that if such a promise could be enforced, sailors would in many cases suffer a ship to sink unless the captain would accede to any extravagant demand they might think proper to make.

The *Attorney-General, contra*, distinguished this case from *Harris v. Watson*, as the agreement here was made on shore, when there was no danger or pressing emergency, and when the captain could not be supposed to be under any constraint or apprehension. The mariners were not to be permitted on any sudden danger to force concessions from the captain; but why should they be deprived of the compensation he voluntarily offers them in perfect security for their extra labour during the remainder of the voyage?

Lord ELLENBOROUGH.—I think *Harris v. Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord KENYON is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at *Cronstadt*, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be con-

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STILK
v.
MYRICK.

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v.
MURKIN.

sidered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of *5l.* a month.

Verdict accordingly.

The Attorney General and Espinasse for the plaintiff.

Garrow and Reader for the defendant.

[*Attorneys, Rippingham and Warry*]

But where a seaman performs some service beyond the scope of his original contract, the case is otherwise. Thus before the ransomning of ships was prohibited, a promise by the captain of a captured ship to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was held binding on the owners, although they abandoned the ship and cargo. *Yates v. Hall*, 1 T. R. 73.

A seaman at monthly wages, who is impressed or enters from a merchant ship into the royal navy during a voyage, is not entitled to wages to the time of

his quitting the ship, unless the voyage be completed.

Anog. Coram Lord Ellerborough, at Guildhall. Dec. 11th, 1806.

Action for seaman's wages.—The plaintiff entered on board the defendant's ship at *Shuas*, and was to have the monthly wages of *6s. 3s.* The ship was bound to *Gibraltar* with a cargo of coals, and she arrived there in safety. She then sailed for *Zante*, where she was to take in a cargo, with which she was to return to *England*. In the course of this voyage, the plaintiff was impressed, and before it was completed the ship was captured. The defendant had paid into

into court the amount of the plaintiff's wages to Gibraltar;—and the question was, whether any thing more was due.—On the part of the plaintiff, it was contended that by virtue of stat. 2 G. 2, c. 36, s. 13, he was entitled to recover his wages from his leaving Gibraltar to the period of his being impressed. It is thereby enacted, “that nothing in that act contained shall extend, or be construed to extend, to debar any seaman or mariner belonging to any merchant ship or vessel, from entering or being entered into the service of his majesty, his heirs, &c. on board of any of his or their ships or vessels; nor shall such seaman or mariner for such entry forfeit the wages due to him dur-

ing the term of his service in such merchant ship or vessel. And even before the passing of that statute, it was held by Holt, C. J. (*Wiggins v. Ingleton*, 2 Ed. Raym. 1211.) that an impressed seaman is entitled to his wages *pro tanto*. It followed, that the plaintiff was entitled to payment at the time when he left the ship, and therefore that he could not be affected by the subsequent casualties of the voyage. But,

Lord Luttrellorough held, that the plaintiff was not placed in a better situation than the other seamen; and was not entitled to any apportionment of wages for his service during a voyage which had not been completed.

1809.

SILK
v.
MYRICK.

ROSE, Administrator, &c. v. BRYANT.

Monday,
Dec. 18.

DEBT on bond dated in the year 1785.

Pleas, payment at and after the day.

Several indorsements on the bond, acknowledging the receipt of interest down to 1793, were proved to

shewing that they were on the bond recently after their dates, and at a time when contrary to the interest of the obligee.

Indorsements on a bond acknowledging the receipt of interest or payment of part of the principal, are not evidence against the obligor to prove that the bond was on foot, without their purport was

be

1890.

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Rose
v.
BRYANT.

be in the hand-writing of the defendant and signed by the intestate. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff for the purpose of meeting certain direct evidence of payment in the year 1794, proposed to read other indorsements on the bond down to the year 1795, acknowledging the receipt of interest and part of the principal : But these latter indorsements were not in the defendant's hand, nor did it appear when they were written, or even that they existed during the intestate's life-time. An objection being taken to their being read,—

Topping for the plaintiff insisted, that they were good evidence. The practice was, to admit all indorsements of this sort which appeared upon the bond; and these were not to be looked to with suspicion, as they could not have been made to repel the presumption of payment, 20 years not having elapsed since the last indorsement in the defendant's own handwriting. The bond remaining uncancelled in the hands of the obligee or his personal representative, it must be taken to be unsatisfied, and these indorsements of part payment were contrary to the interest of the party making them.

Lord ELLENBOROUGH.—I think you must prove that these indorsements were on the bond at, or recently after, the times when they bear date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part

part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable whensover they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. I have been at a loss to see the principle on which these receipts, in the hand-writing of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest.

1809.

Rose
v.

BRYANT.

The plaintiff submitted to be nonsuited.

Topping and Clarke for the plaintiff.

Garrow and Espinasse for the defendant.

[*Attorne*, *W*inchley and *W*arry.]

In *Searle v. Lord Barrington*, 2 *Stra.* 826. 2 *Ld. Raym.* 1370. which was an action brought in 1728 on a bond dated 24th June 1697, to rebut the presumption of payment, indorsements of the receipt of interest in the obligee's own hand, dated in 1699 and 1707, were admitted to be read in evidence, and a bill of exceptions being tendered, judgment for the plaintiff was affirmed, first in the Exchequer Chamber, and then in Parliament. But in *Turner v. Crisp*, 2 *Stra.* 827.

Lord RAYMOND, C. J. who had tried the former cause, held, that such an indorsement made after the presumption had taken place, could not be read in evidence, and that this was different from *Searle v. Lord Barrington*, where the indorsements appeared to be made before they could be thought necessary to encounter the presumption. And in *Glyn v. The Bank of England*, 2 *Vez.* 43. *Lord HARDWICK* is represented to have taken the same distinction.

DECHARME

Tu. 24th,
Dec. 1st.

DICCHARME and WAIN (the former suing as Assignee of James Lane, a bankrupt, and both as Assignees of Peter Degraves, a bankrupt,) v. **LANE.**

In an action by the plaintiff to recover £12,000, due to him from the defendant, it was admitted that the defendant had been trading at the time of the commencement of his bankruptcy, and that he had not paid up his debts in full, and that he had not given notice of his bankruptcy to his creditors, and that he had not made an act of bankruptcy.

THIS was an action on a promissory note payable to *James Lane* and *Peter Degraves* before they became bankrupt.

A separate commission had been sued out against *James Lane*, who carried on trade by himself, and a joint commission against *Degraves* and *the Bainbridge*, who were co-partners.

The defendant at first pleaded the general issue, without giving any notice; but afterwards, under a Judge's order, he withdrew his plea and pleaded it *de novo*, with a notice framed upon 19 C. 3. c. 121, § 10, that he meant to dispute both the commissions under which the plaintiffs were appointed assignees.

Early in the cause the *Attorney General* for the defendant intimated that such a notice had been given, and therefore called upon the plaintiffs to prove the trading and acts of bankruptcy of *Lane*, *Degraves* and *Bainbridge*, and a petitioning creditor's debt to support each commission.

Garrow for the plaintiffs insisted, that he should make a *prima facie* case by putting in the proceedings under the two commissions, and proving the defendant's

and's hand-writing to the promissory note. When it came to the defendant's turn, he might give his notice in evidence; and if it were regular, the plaintiff's would then be put upon strict evidence of the facts necessary to sustain their character of assignees.

1800.
CHARME
and WAINE
v.
LANE.

Lord ELLENBOROUGH.—It is important that the practice upon this point should be settled; and I am clearly of opinion that the notice under this statute is not evidence in the cause. It may be proved as soon as the commission is produced, and it will immediately put the opposite party upon supporting the commission in the same manner as before the act passed.

Garrow then contended, that as the notice was not given at the time when the defendant originally pleaded the general issue, it had no operation, and the proceedings under the commissions were sufficient evidence. The statute enacted, that the notice should be given by the defendant "*at or before* the time of his 'pleading to the action.' " Here it had not been given till *after* the defendant had pleaded, and such a beneficial rule ought to be strictly enforced.

Although in an action by the assignees of a bankrupt, the defendant has once pleaded, without giving notice under 49 C. 3, c. 121, s. 10, which the statute requires to be given, "at or before the time of his pleading," yet if he has leave to withdraw his plea and plead *de novo*, such a notice given with the second plea is sufficient.

Lord ELLENBOROUGH.—The statute did not mean to take away the controul of judges over the proceedings depending in their respective courts. When a party has been regularly permitted to withdraw his plea and plead *de novo*, the last must, when pleaded, be considered the plea to all purposes, and a notice given along with it as a sufficient compliance with the statute. It has been extremely common to allow a

1809.

DECHARME
and WAINEv.
LANE.

defendant to withdraw his plea and plead it again with a notice of set-off. The two cases rest upon the same principles.

Plaintiffs nonsuited.

Garrow, Lawes, and Bolland, for the plaintiffs.

The *Attorney-General, Lawes, and Puller*, for the defendant.

[*Attorneys, Youlkes and Lamb.*]

Wednesday,
Dec. 20.

BOYD v. SIFFKIN.

If there be a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods.

THIS was an action for the non-delivery of hemp. The declaration, after stating that the defendant expected an importation of hemp into this country in a certain ship called the *Funny Almira*, alleged that he agreed to sell to the plaintiff on arrival of the said ship *Funny Almira* about 32 tons (more or less) of Riga Rhine hemp, at 32*l.* 10*s.* per ton, from the landing scale, the amount to be paid by bill at six months.

The bought and sold note produced was dated 13th August, 1808, and was in the following form:

" Sold for Mr. H. Siffkin to Mr. M. Boyd, about " 32 tons, more or less, of Riga Rhine hemp, *on* " arrival per Fanny and Almira, at 82*l.* 10*s.* per " ton, &c. from the landing scale, &c."

1809.
—
Boyd
v.
Siffkin.

The ship afterwards arrived, but without a cargo.

Garrow for the defendant contended, that the contract was improperly set out in the declaration, *on arrival* meaning not on the arrival of the ship, but of the hemp. And he cited as in point the case of *Hawes v. Humble* (*a*).

The

(*a*) *Hawes v. Humble, Lancaster Sumner Assizes, 1809.* This was an action to recover damages for the non-performance of the following contract: "Messrs. Humble and Holland : " Liverpool, Oct. 10th 1807. " Gentlemen,

" I have this day sold for and by your order, *on arrival*, 100 tons, more or less, of Teneriffe Barilla, in your Bon Fim, Taun Feliciano, from Teneriffe, to Messrs. Hawes and Co. at 41*s.* per cwt. 112lbs. warranted of the first quality, and sweet Barilla, and in a merchantable condition, to be received by them from the King's Beam, and if any sea damage, an adequate allowance to be made thereon

to the satisfaction of both parties; the barilla to be paid for as follows; viz. by their acceptance at four months date, deducting two months discount on the whole amount; one third to be drawn for from the first day of landing the barilla, and the remainder from the last day of landing.

Your most obedient servant,
BENJ. BATLEY."

The facts were, that the Bon Fim arrived without any barilla; which it appeared arose from accidental circumstances, and without any imputation of fraud on the defendant.

Wood, E. was of that the —
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1809.

Boydn.

SILKIN.

The *Attorney-General* argued that this was a sale of the quantity of hemp mentioned in the note, depending only upon the contingency of the ship's arrival, and that the defendant had undertaken, that if the ship did arrive she should bring so much hemp as was thus sold.

Lord ELLENBOROUGH.—I clearly think *or arrival* means on arrival of the hemp. The parties did not mean to enter into a wager. By *sold* and *bought* in the note must be understood *contracted* to sell and to buy. The hemp was expected by this ship. Had it arrived, it was sold to the plaintiff. As none arrived, the contract was at an end.

Garrow further pointed out the variance between the name of the ship in the note and declaration, which

any negligence could be proved against the captain in not procuring the barilla, he would receive that evidence.

In the result no proof of negligence could be given, and the plaintiff were nonsuited, with liberty to move the Court upon the question, whether it was an absolute or a conditional contract.

In Michaelmas term last the

question came before the court of King's Bench, when the Judges unanimously agreed that the contract was conditional, and that if there had been any fraud on the part of the defendant, the plaintiff's remedy was an action of deceit. They therefore refused a rule to shew cause why there should not be a new trial.

Lord

Lord ELLENBOROUGH seemed likewise to consider
as fatal.

1809.

BOYD
v.
SIEFFIN.

Plaintiff nonsuited.

The Attorney-General and Curwood for the plaintiff.

Garrow and Holroyd for the defendant.

[Attorneys, Courteen and Gatty.]

Jude Hayward v. Scougall, ante 56. Splidt v. Heath, ante 57 n.

NORRIS v. AYLETT.

Wednesday,
Dec. 20.

ACTION by the payee against the acceptor of a bill of exchange.—Plea, the general issue.

The defence rested upon the following facts, that a former action having been commenced upon this bill between the same parties, it was agreed that the defendant should pay the costs then incurred, give a warrant of attorney for the debt, and renew the bill; that the defendant accordingly gave a warrant of attorney and accepted another bill for the same amount; that the plaintiff afterwards indorsed away the substituted bill; and that it was outstanding in the hands of a third person at the commencement of the present action. The costs of the former suit were not

An action being brought against the acceptor of a bill of exchange, it is agreed between the parties, that the defendant shall pay the costs, renew the bill, and give a warrant of attorney to secure the debt: The defendant gives the warrant of attorney, and renews the bill; but does not pay the costs, — the plaintiff may bring a fresh action on the first bill, while the second is outstanding in the hands of an indorsee.

1800.

NORRIS

v.

AYLLET.

paid; and the substituted bill having been dishonoured when due, was retired by the plaintiff before the trial, and remained unsatisfied in his possession.

Reader for the defendant contended, first, that the debt due upon the bill was merged by the warrant of attorney.—But,

Lord ELLENBOROUGH said, that as judgment had not been entered upon, the warrant of attorney was merely a collateral security, which could not merge the original debt.

Reader then contended, that this action could not be maintained, as when it was brought the substituted bill was in the hands of an indorsee for value, to whom the defendant was liable. In *Kearslake v. Morgan*, 5 T. R. 513, it was held that to assumpsit for goods sold it was a good plea, that the defendant had indorsed a promissory note to the plaintiff *for and on account* of the debt. The defendant in the present case accepted the second bill of exchange *for and on account* of the debt due on the first; and if this fact specially pleaded would have been a bar to the action, it would operate in the same way when given in evidence under the general issue.

Lord ELLENBOROUGH.—The agreement between the parties was, that the defendant should pay the costs of the former suit, execute a warrant of attorney, and give a renewed bill of exchange. If you had pleaded specially, you must have set forth this agreement,

agreement, and you must have averred that you had fully performed it. But the costs of the former suit remain unpaid. The facts of the case furnish no defence either to be put on the record or to be given in evidence. There was to be no extinguishment of the bill, until (among other things) the costs were paid. If they had been paid, this might have brought it within the case of *Kearslake v. Morgan*. But the agreement remaining unperformed on the part of the defendant, the plaintiff reserved to himself the power of rendering the bill available. This is like accord without satisfaction.

Verdict for the amount of the bill; the plaintiff delivering up the substituted bill to the defendant.

The *Attorney General* and *Littledale* for the plaintiff.

Reader for the defendant.

[*Attorneys, Cooper and Luckett.*]

Vide Drake v. Mitchell, 3 East, 251.

Wednesday,
Dec. 20.

STEVENS v. LYNCH.

In an action by
the indorsee
against the
drawer of a bill
of exchange, a
prior indorser is
a competent
witness to prove
that the de-
fendant promised
to pay the bill
after it had be-
come due.

ACTION by indorsee against drawer of bill of exchange, payable to *J. Cleland*, and accepted by *R. Jones*.

There being no direct evidence of notice having been given of the dishonour of the bill, *Cleland* was tendered as a witness to prove that the defendant had subsequently acknowledged his liability upon it, and promised to pay it.

The *Attorney General* for the defendant, objected to *Cleland's* competency, contending that it was clearly his interest to support the present action, as if the plaintiff succeeded, the bill would be extinguished; but if he failed, he might still sue the first indorser.

Garrow, contra, observed, that it did not appear that the plaintiff could maintain an action against *Cleland*, and that if he had been guilty of laches as to one party on the bill, the presumption was that he had as to all.

Lord ELLENBOROUGH.—The objection would exclude the party to a bill in every case where he comes to assist the plaintiff. I do not think that *Cleland* has such a direct interest in the event of this suit as to render him incompetent.

The witness was examined.

The

The *Attorney-General* opened, as a defence, that the plaintiff had given time to *Jones*, the acceptor, and that the defendant was ignorant of that fact when he acknowledged his liability, and promised to pay.

1809.

 STEVENS
v.
LYNCH.

Lord ELLENBOROUGH allowed that this would do away the effect of the acknowledgement and promise; but it appeared that the defendant was fully acquainted at the time, of the indulgence granted to the acceptor, and the plaintiff had a verdict.

Garrow and *Marryat* for the plaintiff.

The *Attorney General* and *Lawes* for the defendant.

[*Attorneys, Hutton and Barrow.*]

In an action of trespass, a co-trespasser not sued, is a competent witness for the plaintiff; but if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, although he is for his co-defendants.

Chapman v. Graves and two others. *Lancaster Spring Assizes, 1810.* Cor. LE BLANC, J.

The plaintiff called one *Riley*, who was a joint trespasser with the defendants, but who had not been made a defendant, for the purpose of proving the trespass.

Cockell, Serjeant, objected to his admissibility, and *Holroyd*

cited a case of *Barnard v. Dawson, Guildhall Sittings after M.T. 1796*, cor. Lord KENYON, C. J. in which such testimony was rejected because the witness was interested in shifting the trespass to the defendants, for as there could be only one satisfaction in trespass, if the present defendants were found guilty, he never could be subject to an action for the trespass.

LE BLANC, J. admitted the witness, saying, that the case cited had never been acted upon.

In this case, *Frost*, one of the defendants, had suffered judgment to go by default; and the plaintiff

1809.

STEVENS
v.
LYNCH.

plaintiff proposed to call him for the purpose of proving the trespass against the other defendants, upon the authority of *Ward v. Haydon and Ventom*, 2 Esp. N. P. Cas. 552, in which Lord KENYON permitted one defendant who had suffered judgment by default to be called to prove that the other defendant, who had pleaded was not guilty; and a case before WOOD, B. at the last Lancaster Assizes, in which he had allowed one joint trespasser, who had suffered judgment by default to be examined as a witness.

Cockell, Serjeant, and Holroyd, contended, that these cases did not apply: that the latter was an action of trespass for mesne profits, in which the defendant who had suffered judgment to go by default, was called by the other defendant to prove that he, the witness, was the sole tenant of the land, and therefore that the other defendant was *not guilty*. In both those cases therefore, the witness was called to *exculpate* the co-defendants, but in this to *inculpate* them. Here, therefore, he has an interest, because by proving the others guilty, he puts it in the power of the plaintiff to levy all against the other defendants if he thinks proper, and there-

fore relieves himself: that no instance can be put in which a co-defendant in trespass who has pleaded not guilty, can be called as a witness, and no distinction had been pointed out between pleading not guilty, and suffering judgment by default, which should make a defendant in the latter situation admissible when he would not be so in the former; that in point of fact the defendant *Frost* was a defendant on the record, and was interested in the issue, for the jury were not only sworn to enquire whether the other defendants were guilty, but what damages the plaintiff had suffered against *Frost*.

LE BLANC, J. said, the general rule was, that no person who was a party to the record was admissible as a witness; that in the two cases cited, the co-defendant was called to exculpate the other defendants; here, it was proposed to call a co-defendant to inculpate the others. The cases therefore were distinguishable; and he was disposed where there was innovation not to extend it, and therefore he held the witness inadmissible.

The plaintiff, however, had a verdict on other evidence.

Vide Bull. N. P. 98. 285.

WILKINSON

WILKINSON v. KING and others.

Thursday,
Dec. 21.

TROVER for a quantity of lead.

The plaintiff had sent the lead in question to the wharf of one *Ellil* in the Borough of Southwark, there to remain till it should be sold. *Ellil* was accustomed to sell lead from this wharf; but had no authority whatever to sell the lead in question, and never had sold any for the plaintiff before. However, he sold this lead to the defendants, who bought it *bona fide* as his property, and paid him for it by a bill of exchange.

The owner of goods sends them to a wharf in the Borough of *Southwark*, where goods of the same sort are usually sold: The wharfinger, without any authority, sells them to a *bona fide* purchaser, who does pay for them. This is not a sale in *market overt* to change the property, and trover lies for the goods at the suit of the owner against the purchaser.

Garrow contended, that this sale had taken place in *market overt*, and had transferred the property in the lead to the defendants. The spot where the transfer was made was in the Borough of *Southwark*, which must be considered a part of the metropolis; and it was laid down in the books on this subject, that in *London*, every shop in which goods are publicly exposed to sale, is *market overt* for such things as the owner professes to trade in, and that though in the country *market overt* is only on the special days when the market is held by charter or prescription, yet in *London*, every day, except Sunday, is *market day*. Therefore, this lead having been sold to the defendants by *Ellil* at his wharf, where he dealt in lead, became their property, and the plaintiff must

1809.
 WILKINSON
 v.
 KING
 and others.

must seek his remedy against *Ellil*, whom he had enabled to commit the fraud, out of which the action arose.—But,

Lord ELLENBOROUGH held that the sale by *Ellil* did not change the property in the lead, and observed that the doctrine contended for would give wharfingers the dominion over all the goods intrusted to them; but that a wharf could not be considered, even in *London*, as a market overt for the articles brought there. *Ellil* had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion.

Verdict for the plaintiff.

The *Attorney General*, *Park*, and *Richardson* for the plaintiff.

Garrow, *Gaselee*, and *Barnewall* for the defendants.

[*Attorneys, Dodd and Wadeson.*]

At the sittings after Hilary Term, 1810, other actions by the same plaintiff against other defendants, to whom *Ellil* had sold quantities of lead under the same circumstances, came on to be tried before Lord ELLENBOROUGH, when after full argument, his Lordship adhered to his former opinion.—*Vide* 2 Blac. Com. 449.

If goods stolen are pawned, the owner may maintain trover against the pawnbroker.

Packer v. Gillies, Guildhall Sittings after Trinity Term, 1806 Trover against a pawnbroker for goods pledged with him, which had been stolen. It appeared that the goods in question were stolen from the house of the plaintiff, and had been pawned by

by a woman of the name of Brown, but that she had been tried for the felony, and acquitted, on the absence of a material witness. Lord ELLENBOROUGH held, that the action well lay, and the plaintiff had a verdict.

N. It is provided by stat. 1. Jac. 1. c. 21. that the sale of any goods wrongfully taken to any *pawnbroker* in London, or within two miles thereof, shall not alter the property.

1809.

WILKINSON.
v.
KING
and others.

HEYMAN v. NEALE.

Thursday,
Dec. 21.

THIS was an action for not accepting a quantity of hemp.

The question was, whether there had been a complete contract between the parties upon this subject.

Mr. Forrester, the broker, swore that he had authority from the plaintiff to sell, and from the defendant to buy, the hemp in question for the one and the other respectively; that he in consequence made an entry in his book, of having sold it for the plaintiff to the defendant; that he then sent a copy of this entry to each of the parties; and that when he next saw the defendant, the latter objected to the terms of the *bought note*, and said he would not be bound by it. The witness added, that he conceived he was authorized

Where a broker is authorized by one man to sell goods, and to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is a binding contract between the parties. The *bought and sold note*, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract.

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HEYMAN
v.
NEALE.

rized to buy the hemp for the defendant on the terms mentioned in the sale book.

Park contended that the bought and sold notes were only sent on approbation, and the contract was not complete till they were agreed to by the parties; that though consent might be inferred from no objection being taken, either party might disaffirm the contract by giving immediate notice of his dissent; that the broker was vested with powers merely to propose the conditions of the bargain, but not finally to conclude it; and that as the defendant had taken the earliest opportunity of informing *Mr. Forrester*, that he was dissatisfied with the bought note, the present action could not be sustained.

Lord ELLENBOROUGH.—After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. The *bought and sold note* is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the *bought and sold note* is only a copy of the other, which would be valid and binding, although no *bought or sold note* was ever sent to the vendor or purchaser. The defendant is equally liable in this case as if he had signed the entry in the broker's book with his own hand.

It afterwards appeared that the hemp was not of the quality specified in the contract, and the plaintiff submitted to be nonsuited.

The

The *Attorney-General*, *Garrow*, and *Tuddy*, for
the plaintiff.

1809.

Park, *Jervis*, and *Espinasse*, for the defendant.

HEYMAN
v.
NEALE.

[*Attorneys, Kaye and Reeks.*] *

The authority of the broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the Statute of Frauds, although he has previously entered into a verbal agreement to sell the goods.

Farmer v. Robinson, Cor.
Lord ELLENBOROUGH, *Guild-*
hall, July 22, 1805.—Action
for not delivering a quantity
of brimstone. The defendant

had authorized a broker to sell some brimstone for him at a certain price, and the broker had accordingly agreed to sell it to the plaintiff at that price; but before the sale note was made out, defendant countermanded the authority of the broker, and said, that plaintiff should not have the goods.— Lord ELLENBOROUGH held, that under these circumstances the contract could not be enforced.

STOKES *v.* CARNE and others.

Saturday,
Dec. 23.

ACTION for stores supplied to a packet employed by the Post Office to carry the mail between Milford Haven and Waterford. The stores had been ordered by the captain who is appointed by the post-master-general.

In an action against several defendants for stores supplied to a ship by order of the captain, the register obtained on the oath of one of the defendants is prima facie evidence of ownership against all.—The owners of a post-office packet stores ordered by the captain who is appointed by the postmaster-general,

To

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 STOKES
 $v.$
 CARNE
 and others.

To prove that the defendants were owners of the packet, the register was put in, which appeared to have been obtained on the oath of *John James*, one of the defendants (*a*).

Garrow contended that this was not sufficient evidence to charge all the defendants, and that it was necessary to prove their title more strictly, or to shew that they had acted as owners.

Lord ELLENBOROUGH.—I think the register is *prima facie* evidence of ownership. I will admit contrary evidence on the part of any of the defendants, to prove that they never assented to their names being put into the register, and never had any connexion with the vessel in question. Had notice been given that they meant to deny the ownership, perhaps the plaintiff might have been put upon stricter proof of that fact; but where persons are sued as owners, who give no such notice, the register is sufficient to throw the burthen upon them of proving the contrary.

Garrow then insisted that the defendants could not be liable for stores ordered by a captain appointed, not by them, but by the post-master general, and who was the servant and agent of government.—But,

Lord ELLENBOROUGH held, that as the stores were supplied to the packet of which the defendants were

(*a*) 25 G. 3. c. 60. § 10, 11.

owners,

owners, and the earnings of which they received, they were liable as in the common case of stores or repairs ordered by the master of a merchant vessel.

The plaintiff had a verdict.

The *Attorney-General* and *Gaselee* for the plaintiff.

Garrow and *Marryat* for the defendants.

[*Attorneys, Westons and Welch.*]

Vide *Fraser v. Hopkins*, *ante* 170.

BLACKBURN v. SCHOLES and another.

Friday,
Jan. 19.

THIS was an action for goods sold and delivered to recover the sum of 2132*l.* being the price of 94 bags of cotton wool.

The defendant pleaded the general issue, and paid 5*l.* into court.

Before the payment of money into court, a particular had been delivered under a judge's order, stating that the action was brought for the price of 94 bags of cotton wool sold for the plaintiff to the defendants, by *Messrs. Kenyon and Son* on the 17th of June, 1807.

In *indebitatus assumpsit* for goods sold, payment of money into court after a particular stating that the action is brought for the price of a certain lot of goods sold to the defendant on such a day by A. B. the plaintiff's broker does not admit that the goods purchased by the defendant of A. B. on the day specified, were the property of the plaintiff.

It was proved that on that day *Messrs. Kenyon and Son* sold such a quantity of goods to the defendants

1809.

fendants in one lot; but at first no evidence was given that any part of these was the property of the plaintiff.

BLACKBURN
*v.*SCHOLES
and another.

Park for the plaintiff contended that the property was admitted by the payment of money into court. The contract stated in the declaration was, a sale by the plaintiff of goods, his property, to the defendants. The amount of the goods was ascertained by the particular, and it appeared that they were all sold at one time. The defendants, therefore, after paying money into court, could not deny that the goods were the property of the plaintiff.

The *Attorney-General, contra*, allowed that if there had been a special count stating the contract, the payment of money into court would have had the effect contended for; but took a distinction between a special and a general count. In the former, the contract must be proved exactly as laid; in the latter, the plaintiff may declare for fifty thousand pounds worth of goods, and recover for forty shillings worth. Here the defendants merely admitted that of the 94 bags of cotton wool bought by them on the 17th of June, 1807, so much as amounted to the price of 5*l.* belonged to the plaintiff, and it might very easily have happened that *Kenyon and Son* might sell in one lot goods belonging to several different persons. Suppose the defendant had pleaded a tender of 5*l.* and *non assumpsit* as to the residue, would this have been an admission of the contract to the full extent stated in the declaration or particular?

Lord

Lord ELLENBOROUGH held that the plaintiff was bound to prove that the goods were his property (a).

Evidence was then given that *Kenyon and Son* having bought these goods for the plaintiff in November 1806, advertised them for sale in June 1807, by a printed catalogue, in which they were themselves denominated *sworn brokers*; but that they afterwards sold the whole parcel as principals by private contract to the defendants; that the defendants paid 1300*l.* part of the price by bills drawn in conformity to the conditions of sale; that afterwards and before the defendants had notice of the goods being the plaintiff's property, they paid *Kenyon and Son* the residue of the purchase money (short of 5*l.*) by bills of a different description.

Park contended that the defendants must have known from the catalogue that *Kenyon and Son* were only brokers in this transaction, and that they were clearly liable for the value of goods beyond the 1300*l.*

Lord ELLENBOROUGH.—A broker with an undisclosed principal may vary the terms of payment after the sale is completed. The principal may interfere at any time before payment, but not to rescind what has been before done. This is essential to the safety of purchasers. But if a man sells goods acting as a broker, the moment the sale is completed he is *functus*

1810.

BLACKBURN

v.

SCHOLLES
and another.

If goods are sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract.—

Alio, where the principal is disclosed at the time of sale.

The circumstance of persons selling goods being described in the catalogue of sale as *sworn brokers*, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals.

1810. *officio.* The terms of the contract cannot then be altered except by the authority of the principal. The question here therefore will be, whether Kenyon and Son sold these goods as principals or as brokers?

**BLACKBURN v.
SCHOLES
and another.**

Vetdict for the defendant.

Park, Lawes, and Paller, for the plaintiff.

The Attorney-General, Garrow, and Holroyd for the defendant.

[*Attorneys, Will and Sadoe.*]

Falk Bennet v. Favenc, 11 East, 36.

Saturday,
Jan. 20.

STONARD v. DUNKIN and another.

A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgement that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is re-measured, and that before the malt in question was re-measured, the seller became bankrupt.

TROVER for malt,—the question being, whether the plaintiff, or the assignees of one *Knight* were entitled to it.

The plaintiff gave in evidence an order from *Knight* to the defendants, who are warehousemen, to hold the malt on the plaintiff's account, a written acknowledgement from the defendants that they held the purchaser, that by the usage of trade the property in malt sold is not transferred till it is re-measured, and that before the malt in question was re-measured, the seller became bankrupt.

it on the plaintiff's account; and that he had advanced 7,500*l.* to *Knight*, for which the malt was to be a security.

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STONARD

v.

DUNKIN
and another.

Garrow for the defendants contended that the malt, notwithstanding, passed under the commission to *Knight's* assignees, as from the universal usage and consent of the trade (which he undertook to prove) *re-measuring* was necessary to a transfer of property in articles of this nature, and the *transferee* intervened before the malt in question was delivered.

Lord ELLENBOROUGH.—Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, "the malt is not yours," after acknowledging to hold it on his account. By so doing, they attorned to him; and I should entirely overset the security of mercantile dealings, were I now to suffer them to contest his title.

Verdict for the plaintiff.

The *Attorney-General* and *Lawes* for the plaintiff.

Garrow and *Gaselee* for the defendants.

[*Attorneys, Touse and Drury.*]

Vide Harman v. Anderson, ante 243.

Saturday,
Jan. 20.

TATE v. GWINNE.

In an action on a bill of exchange accepted for the price of goods purchased for exportation, the defendant cannot give in evidence that the goods were of a bad quality, and improperly packed but is driven to his cross-action.

THIS was an action by the drawer and payee of a bill of exchange for 1,984*l.* against the acceptor. Plea, the general issue.

The defendant proposed to prove, in mitigation of damages, that the bill had been accepted for the price of a quantity of cheese sold by the plaintiff to the defendant for exportation; that the cheese was of a bad quality, and improperly packed, and that the consideration for the acceptance had in a great measure failed.

The *Attorney-General*, for the plaintiff insisted that this evidence was inadmissible, and relied upon *Morgan v. Richardson*, 1 *Campb.* 40.*n.* which in its circumstances could not be distinguished from the present case, and which he himself had brought before the court of King's Bench, when, the direction of the Chief Justice at Nisi Prius was fully confirmed.

Garrow, contra, said that in that case there was money paid into court, a circumstance on which one of the Judges had placed considerable reliance. Here there was nothing to prevent the defendant from proving a partial failure of consideration. On the principle laid down in *Farnsworth v. Garrard*, 1 *Campb.*

1 *Campb.* 33. the defendant ought to be allowed to shew that he had derived less benefit under the contract than he had stipulated for, without being driven to his cross action. This very point had been decided by Lord KENYON in *Barber v. Backhouse, Peak Cas.* 61, where it was held, that if there be no consideration for part of the sum contained in a bill of exchange, the jury may apportion the damages, and need not find to the whole amount.

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—
TYE
v.
GWINNE.

Lord ELLENBOROUGH.—Sitting here, I shall certainly adhere to the judgment of the Court in *Morgan v. Richardson*. Although money was there paid into court, that circumstance formed no ingredient in the opinion I then expressed. A bill of exchange cannot be accepted on a quantum meruit. There is a difference between want of consideration, and failure of consideration. The former may be given in evidence to reduce the damages; the latter cannot, but furnishes a distinct and independent cause of action. In *Farnsworth v. Garrard* no bill of exchange had been given, and I held that upon the *quantum meruit*, the defendant might shew the exact degree of benefit he had received, or that he had received none. The last case cited, I think does not apply, as there never was any sufficient consideration to the full amount of the bill, which was fraudulently drawn on the partnership. And I am still inclined to acquiesce in the dictum of Mr. Justice DENNISON there quoted, that “there is a distinction between the *contract* and the *security*.” If part of “the *contract* arises on a good consideration, and

1809. "part on a bad one, it is *desirable*. But it is otherwise as to the *security*, that being *entire*." (a).

^{v.}
TYE
Gwynne.

However, the next cause standing in the paper being a cross action between the same parties, it was agreed to refer both to arbitration.

The *Attorney-General* and *F. Pollock* for the plaintiff.

Garrow, Lawes, and Puller for the defendant.

[*Attorneys, Wild, jun. and Wild.*]

(a) 2 Burr. 1082.—*Vide Ledger v. Ener*, Peak. Cas. 216. *Wiffen v. Roberts*, 1 Esp. Cas. 261. *Fleming v. Simpson*, 1 Campb. 40 n.

Saturday,
Jan. 20.

Where a factor advances money to purchase goods, if he receives, besides legal interest, a higher commission on these purchasers than he would have been contented to take had he not advanced the money, the transaction is various.

HARRIS and another v. BOSTON.

THIS was an action to recover a sum of about 3,900*l.* upon two bills of exchange, and the balance of an account.

The plaintiffs were seed factors, and bought large quantities of rape seed for the defendant; they advanced the money for these purchases, for which they charged the legal interest of 5*l.* per cent.; and in addition to that, it was agreed that they should have a commission of $2\frac{1}{2}$ per cent. upon all the seed purchased. In this manner the debt was contracted.

The

The defence was, that these transactions were usurious; and many witnesses acquainted with the trade were called, who swore that the highest commission they had ever known taken upon such purchases was *one shilling a quarter*, which at the current price of rape seed amounted exactly to one per cent.

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HARRIS
and another.
v.
BOSTON.

Lord ELLENBOROUGH.—It will first be a question of fact, whether the commission of $2\frac{1}{2}$ per cent. exceeds what can be fairly and reasonably referred to the plaintiff's trouble and risk in making these purchases. If it does, then by an inference of law, it must be ascribed to the advance and forbearance of the money, and the contract is usurious. If the plaintiffs would have duly made the purchases for one per cent. but charge $2\frac{1}{2}$ besides legal interest where they advance the money, this commission must be considered an expedient for enhancing the rate of interest beyond 5 per cent. and is a mere colour for usury.

The Jury however found a verdict for the plaintiff.

Park and *Parnther* for the plaintiffs.

The Attorney-General and *Marryat* for the defendant.

[Attorneys, *Druce and Lee.*]

—^o *Vide Morse v. Wilson*, 4 T. R. 353.

Monday,
Jan. 22.

PHELPS v. AULDJO.

The master of a merchantman while taking in his loading at a foreign port, is ordered by the captain of a King's ship to go out to sea to examine a strange sail discovered in the offing, bearing enemies' colours: Without remonstrating, and without any force or threats being employed to influence his determination, he obeys; and finding the strange sail to be a neutral, he returns to port. Held, that this was an unexcused deviation, which vacated a policy on goods on board the merchantman.

ACTION on a policy of insurance on goods on board the *Margaret and Anne* from *Iceland* to this country. The risk was made to commence in the common form, from the loading of the goods. A total loss was proved as laid, to have happened by fire; and the only question was, whether the master had not been guilty of a deviation.

It appeared that while he lay at *Iceland*, and when he had taken in almost the whole of the cargo, the captain of an English ship of war lying near him, the topmast and yards of which were then struck, ordered him to go out to sea to examine a strange sail, which was discovered in the offing bearing enemies' colours; that the master did not remonstrate against this order, but unmoored and put out to sea; that although 40 of the crew of the ship of war had been on board the *Margaret and Anne* in the morning of the same day, they had all been withdrawn before he began to unmoor, and that no violence or threats were used to induce them to do so; that he fired two guns at the strange sail and brought her to, when she appeared to be a neutral; and that he then returned to his moorings. Being examined as a witness, he said he considered himself bound to obey the orders of the captain of the ship of war; but he did not make any protest upon the occasion.

The

The *Attorney-General*, for the plaintiff, contended that the deviation was excused by the controul exercised over the master. He did not expostulate, because his expostulations would have been unavailing. The captaiu of the ship of war had ample means of enforcing his orders. If this was held to vitiate the policy, the consequence would be, that masters of merchantmen would constantly resist the commands of the King's officers.

Lord ELLENBOROUGH.—I am of opinion that this is an unexcused deviation. Where is the *vis major*? The master is not proved to have acted under any duress or compulsion. If a degree of force was exercised towards him which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified. But if he chose to go out in the hope of making a prize, he could not thereby extend the risk of the underwriters. Suppose the ship had been captured when she went out upon this cruise, were the underwriters to bear the loss? The purpose might be laudable, and a compensation to the owners would probably have been made by government; but when the ship engaged in this hostile adventure, the voyage insured was at an end.

Plaintiff nonsuited.

The *Attorney-General, Garrow, and Marryat*, for the plaintiff.

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v.
Auldey.

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Park, Topping, and J. Warren, for the defendant.

PHELPS
v.
AULDJO.

[Attorneys, *Steain and Crowder.*]

It seems now settled that if an English ship be seized or detained by our own government, for purposes of state, the underwriters are liable, (Page v. Thompson, Park, 109, n. 6th Ed.); although a British underwriter be not liable to answer for any damages which the owner of a foreign vessel may sustain from an embargo laid on foreign ships in the ports of Great Britain, in the nature of reprisals and partial hostility. *Touteng v. Hubbard*, 3 Bos.

Pul. 291. But if a British ship be stopped in her course by the captain of a king's ship, from an apprehension of hostilities, and after being detained till intelligence arrives of a hostile embargo at the port of destination, she returns to her port of outfit; this loss of the voyage is not attributable to the *arrest or detention of kings, princes, or people*, and is not within the policy. *Forster v. Christie*, 11 East, 205.

Monday,
Jan. 22.

RANDALL, v. LYNCH.

If by reason of the crowded state of the *London Docks*, a ship is detained there before she can be unloaded, a longer time than is allowed for that purpose by the terms of the charter party, the freighter is liable for this detention to the owner of the ship.

THIS was an action on a charter party of affreightment, dated 1st April 1809, for a voyage to *Lancetello* and back to London; whereby it was covenanted that, "being fully laden and dispatched, " the master should and would with the then first "favourable opportunity, set sail and depart from "the port or place at which he might have completed his homeward cargo, and proceed direct to "the said port of London, and upon arrival there (that

"(that is to say) at the *London Docks*, after regular report being first made at the Custom-house, make discharge and faithful delivery of the said homeward cargo and every part thereof unto the said affreighter or his order, or according to bill or bills of lading, or otherwise, and there end and complete both out and homeward voyages;" and it was further covenanted, "that forty days should be allowed for unloading, loading, and again unloading the said cargoes, to commence and be computed at *Lanceretto*, from, and including, the day after the said master should be ready to make discharge of such part of his cargo as was intended to be landed there, and notice given thereof to the said affreighter's agent at that place, and to continue in London from the day of reporting at the Custom-house: and likewise it was agreed between the parties, that it should be lawful for and at the option of the said affreighter or his agents to keep and detain the said vessel for the space of ten working days over and above the herein before stipulated forty days, upon paying him the said master or his representative 5*l.* sterling per day for each and every of the said ten over lying day or days of demurrage."

In the declaration, the following breach was assigned "that the defendant did not nor would unload, load, and unload again the said respective cargoes of the said vessel within the said forty days in the said charter party mentioned, and stipulated and allowed for those purposes, computed as therein mentioned, and the said space of ten working days over and above the said

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stipulated 40 days, but kept and detained and caused to be kept and detained the said ship or vessel with a part of the said homeward cargo on board her in the *London Docks* aforesaid, for another long space of time, to wit, the space of 35 days after the expiration of such several periods of forty days and ten days; whereby the plaintiff, during all the time last aforesaid, lost and was deprived of the use and profit of his said ship or vessel, contrary, &c."

The defendant pleaded *non est factum*; and to the last breach "that he did not keep and detain and cause to be kept and detained the said ship or vessel with a part of the said homeward cargo on board her in the London Docks aforesaid, after the expiration of such several periods of forty days and ten days *modo & forma*, &c."

The ship arrived from *Lancetto* in the *London Docks* on the 10th of August, and was reported next day at the Custom-house. The 40 days stipulated in the charterparty for unloading the outward cargo, and loading and unloading the homeward cargo, expired on the 22d of August; but on account of the crowded state of the Docks, her discharge could not then be begun, and it was not finally completed till the 6th of October, being about 31 days after the expiration of the ten days during which time she might be kept on demurrage of 5*l.* a day. The question was, whether the defendant as freighter was, under these circumstances, liable for the detention of the ship?

The

The *Attorney-General* for the defendant contended that an action might as well be brought against the captain or owners for not making a due delivery of the cargo. The one was as anxious to receive as the others to get rid of it. The delay was not in any degree to be imputed to the defendant, but to circumstances over which he had no controul. It could not be said, that he had his remedy over against the Dock Company, who were as little in fault as the owner of the ship or the freighter. To what was the delay to be imputed? Solely to the act of parliament, which requires ships with such cargoes to unload in the *London Docks*. The Dock Company had done every thing in their power to expedite the discharge of all the ships that entered the Docks; but the number at this time was so extraordinary that many of them were necessarily obliged to wait weeks before they could get a birth. The Docks could not be enlarged at pleasure to suit the exigency of the moment. Upon this issue, the plaintiff was bound to prove that the defendant had detained the ship in the manner stated in the breach. He had not done so. It was impossible for him to do so. The ship had been detained not by the defendant, but by the statute in such case made and provided.

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Lord ELLENBOROUGH.—The question is, whether the detention of the ship arising from the inability of the London Dock Company to discharge her is, in point of law, imputable to the freighter; and I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore

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her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so. While the goods remained on board the vessel in the *London Docks*, it was impossible for the plaintiff to make any use of her, and to all intents and purposes she was there detained by the defendant. When she was brought into the Docks, all had been done which depended upon the plaintiff, and the Dock Company were the defendant's agents for her delivery. The defendant is as much responsible for a delay arising from the want of a birth, as if it had arisen from tempestuous weather or any other cause. This issue must therefore be found for the plaintiff, and the jury will consider to what compensation he is entitled for the detention after the ten days during which the ship was allowed to be detained at 5*l.* a day.

The jury awarded 31 days more at the same rate (*a*).

If by a charter-party leave is given to detain the ship a certain number of days for the purpose of discharging her cargo, this amounts to a covenant on the part of the freighter, that he will not detain her longer.

In the ensuing term the *Attorney-General* (without objecting to the CHIEF JUSTICE's direction upon this point, or the manner in which the issue joined on the record had been found) moved *in arrest of judgment*, on the ground that the breach for detaining the ship beyond the 40 lay days, and the 10 demurrage days, was not warranted by the charterparty, there being no covenant on the part of the freighter to deliver up the ship at the end of that time.—A rule to shew

(*a*) *Vide Atkinson v. Ritchie*, 10 East, 530.

cause

cause was granted, but it was afterwards discharged, the COURT clearly thinking, that from the leave given to the defendant to keep the ship so long, there was an implied covenant that he would keep her no longer, upon which the breach was well assigned (*a*).

The defendant had paid money into court on the breach for non-payment of freight.

A question arose at the trial, whether this dispensed with the necessity of proving the execution of the charterparty.

The *Attorney-General* insisted that the plaintiff was still bound to produce the attesting witness, that he might be cross-examined as to the circumstances under which the deed was executed.—But,

Lord ELLENBOROUGH held, that the rule to pay money into court was a sufficient admission of the execution of the deed to dispense with the production of the attesting witness.

Park, Topping, and Marryat, for the plaintiff.

The *Attorney-General, Garrow, and Barrow*, for the defendant.

[*Attorneys, Hatton and Barrow.*]

• (*a*) *Vide Com. Dig. Covenant. (A. 2.)*

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In an action of covenant, if money be paid into court on any one of the breaches, it is unnecessary to prove the deed.

COURT OF COMMON PLEAS.

SITTINGS AFTER TERM AT WESTMINSTER.

CLIFFORD, Esq. v. BRANDON.

THIS was an action of assault and false imprisonment.—The first count of the declaration stated, that the defendant, with force and arms, &c. made an assault upon the plaintiff in a certain public theatre, called *The New Theatre Royal, Covent Garden*, situate in the parish of St. Paul, Covent Garden in the county of Middlesex, and seized and laid hold of the plaintiff and struck him a great many violent blows, and forced and compelled him to go from and out of the said theatre into and along a certain street there to a certain police office situate and being in the parish aforesaid, in the county aforesaid, and imprisoned him, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, contrary to the laws of this realm, &c. The second count was for false imprisonment generally; and the last for a common assault.

Although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, tho' without offering personal violence or a riot.

to any individual or doing any injury to the house, they are, in point of law, guilty

Pleas

Pleas, 1. Not guilty. 2dly, that before and at the said time when, &c. the said theatre in the said declaration mentioned was and is a certain public theatre, the proprietors whereof then and there had lawful licence, power, and authority from time to time to exhibit and present tragedies, comedies, operas, plays, and farces within the said theatre, and to take and receive certain reasonable sums of money as and for the prices of admission into the said theatre from and of persons wishing to see and hear the performance and exhibition of such tragedies, comedies, operas, farces, and plays within the said theatre (*a*); and that

a little

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v.
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(*a*) The Covent Garden Company act under a patent, bearing date the 15th of January, 1661, of Charles II. granted to Sir Wm. DAVENANT, whereby he, his heirs, executors, administrators, and assigns are authorized to erect a new theatre in any place within the Cities of London and Westminster, or the suburbs thereof; and to gather together, entertain, govern, privilege, and keep a company of players to exercise and act tragedies, comedies, plays, operas, and other performances of the stage therein; who were to be the servants of his Majesty's dearly beloved brother JAMES DUKE OF YORK; and "to take and receive of such as shall re-

sort to see or hear any such plays, scenes, and entertainments whatsoever, such sum or sums of money as either have accustomably been given and taken in the like kind, or shall be thought reasonable by him or them in regard of the great expence of scenes, music, and such new decorations as have not been formerly used."—The patent then prohibits the exhibiting of plays by all others besides this company and a company to be established by T. KILLIGREW, Esq; and called *the King and Queen's Company*;—directs that no actor ejected by one of these companies shall be received into the other, without the consent of the company whereof he was a member

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BRANDON.

a little before the said time when, &c. to wit, on the day in the declaration mentioned, the plaintiff, together with divers other persons to the number of three and more, unlawfully, riotously and routously made and raised, or caused to be made and raised, a great noise, riot, disturbance and tumult in the said theatre for the purpose of forcing and compelling, and in order unlawfully and by force and violence to compel the said proprietors of the said theatre to lower and reduce the prices of admission into certain parts of the said theatre, and for that purpose at the time when, &c. and during the performance of a certain farce or play in the said theatre, the plaintiff and the said other persons, to the number of three and more, were making a great noise, riot, disturbance, and tumult in the said theatre, to the great annoyance and disturbance of divers peaceable and orderly subjects of our Lord the King, then being in the said theatre for the purpose of hearing and seeing the performance of the said farce or play, to the great damage and injury of the said proprietors of the said theatre, and in breach of the peace of our said Lord the King; wherefore the defendant at the time when, &c. as the servant of the said proprietors of the said

a member, signified under hand and seal;—grants permission for women's parts to be represented by men;—requires the old plays to be purged of all scandalous and offensive passages; and concludes with a *non obstante* clause,

giving full effect to the patent, “any law, statute, act, ordinance, proclamation, provision, or restriction, or any other matter, cause, or thing whatsoever, to the contrary in anywise notwithstanding.”

theatre,

theatre, and by their command, gave charge of the plaintiff in the said theatre to one *S. T.* who then and there was a constable and peace or police officer, duly and lawfully authorized to take such charge, to be by him taken and carried before some magistrate and justice of the peace in and for the said county of Middlesex, to be examined touching and concerning the said riot and breach of the peace, and to be dealt with according to law; and on that occasion, and for that purpose, the said *S. T.* took charge of and took the plaintiff into custody, and brought him from and out of the said theatre into and along the said public street there to the said police office, the same being the nearest and most convenient way, before *James Read*, Esq. then and there being one of the justices, &c. to be examined touching and concerning the said offence, riot and breach of the peace and to be further dealt with according to law, and on that occasion the plaintiff was necessarily and unavoidably kept and detained in custody and imprisoned for the space of time in the declaration mentioned, and until he was afterwards duly discharged therefrom, as was lawful, &c.—3dly, After stating the riot as before, that at the said time when, &c. the plaintiff was in the said theatre unlawfully, wickedly, and maliciously inciting and encouraging, and endeavouring and labouring to persuade, instigate and prevail on, and did then and there unlawfully, wickedly, and maliciously incite, encourage, endeavour and labour to persuade, instigate and prevail on the said persons to the number of three and more, and divers other disorderly and riotous persons then in the said

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theatre to persevere and continue in such riotous, routous, and unlawful tumult, riot, and disturbance, and the said persons and others did then and there, in pursuance of such wicked instigations and endeavours, continue to make, and at the said time, when, &c. were making a great noise, riot, disturbance, and tumult in the said theatre for the unlawful purposes aforesaid; whereupon the defendant as the servant, &c. 4thly, That the plaintiff and others to the number of three and more, were making a noise and riot for the purpose of preventing the performance of a certain farce which the proprietors had lawful power, licence, and authority to cause to be performed and represented in the said theatre: 5thly, That he was instigating others to make a riot for the same purpose.—There were three other pleas more general than the foregoing.

Réplication, *'de injuria sua' propria, absque tali causa.*

It appeared in evidence that the plaintiff Mr. Clifford, a gentleman of great eminence at the bar, on the 31st of October last, between nine and ten in the evening, went into the pit of Covent Garden theatre, which had been lately rebuilt. On this, as on every night from the first opening of the house, great noise and confusion prevailed, on account of the prices of admission to the pit and boxes being raised, and the public being excluded from a number of boxes which were let to particular individuals for the season. The performance on the stage was inaudible: the spectators sometimes stood on the benches, and

at other times sat down with their backs to the performers; while the play was representing, “God save the King!” and “Rule Britannia!” were sung by persons in different parts of the theatre; horns were blown, bells were rung, and rattles were sprung; placards were exhibited, exhorting the audience to resist the oppression of the managers; and a number of men wore in their hats the letters O. P. or N. P. B., meaning *Old Prices* and *No Private Boxes*. But although there were some sham-fights in the pit, no violence was offered to any person either on the stage or in any other part of the house, and no injury was done to the theatre itself, or any of its decorations. When Mr. *Clifford* entered, there was a cry of “There comes the honest counsellor!” and a passage being opened for him, he went and seated himself in the centre of the pit. Soon afterwards, a gentleman asked him, if there was any harm in wearing the letters O. P. He answered “No.” The gentleman then asked him, if he had any objection to wear them himself. He said *he had not*. The letters O. P. were then placed in his hat, and he put it on thus ornamented. He continued, however, to sit without taking any part in the disturbance, and he persuaded a person who was near him to desist from blowing a trumpet. Having conducted himself in this quiet manner while he remained in the theatre, he was retiring from it. Whether the performance was entirely over at the time, did not certainly appear. When he had got about two yards from the pit door, where the money is received, the defendant, who is Box-keeper to the theatre, ordered him to

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be taken into custody. A constable accordingly laid hold of him, and carried him to the police office in Bow-street, before Mr. *Read* the magistrate presiding there; but nothing being proved against him, except that he wore O. P. in his hat, after being detained about half an hour, he was set at liberty. The question was, whether these facts proved the justification? .

*Best*, Serjeant, for the plaintiff, contended that there had been no riot in the theatre; that the plaintiff had not instigated it, if there was; and that, at all events, he had been illegally arrested and imprisoned after the riot had ceased. A riot must be to the terror of his Majesty's subjects. In this instance, no terror or apprehension was felt by any one. The audience were more amused with what was going forward than they would have been by the performance of the stage. Within the walls of a public theatre, the public have a right to express their approbation or disapprobation without limit or controul. This is a right which has been immemorially exercised, which is essential to the prosperity of the drama, and which never was before questioned in a court of justice. It stands on the same principle with liberty of criticism, which the judges have often declared to be sanctioned and protected by law. A piece may be hooted from the stage—as it may be censured and ridiculed in writing when it is published. An actor may be praised or condemned in a newspaper or pamphlet for his theatrical performances. So he may be hissed or applauded at the moment,

by those who witness his efforts. Is the conduct of the *managers* then to be privileged from all animadversion? Upon this in a great measure depend public amusement, public taste, and public morals. And how are the managers to be controlled, except by an unequivocal manifestation of public opinion? From the system of monopoly on which our theatres are governed, people cannot leave a theatre where they are ill used, and frequent another, which is conducted with more liberality. Their only remedy is to express their disapprobation in the hearing of the manager, and to bring him to terms of submission. This accordingly is the course which has been always pursued. Mr. *Garrick* and the first men who have undertaken the management of our theatrical concerns have hitherto chearfully yielded to the jurisdiction of the pit, without a thought of appealing to Westminster Hall. Such is the generosity as well as the discrimination of the British public, that there can be no danger of this power being converted to purposes of vexation or injustice. In the present instance, the managers of *Covent Garden Theatre* have done every thing to aggrieve and insult the public, and the opposition to their tyranny has been marked by great moderation and forbearance. They have raised the prices of admission most needlessly; and according to the argument on the other side, had they insisted upon seven guineas for admission to the boxes, instead of seven shillings, no one had any right to complain. Formerly, any of the gentlemen of the jury might have occupied the box in the theatre which the night before was honoured by the presence of the SOVEREIGN himself and his august family; but

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the managers have now attempted to exclude the public from a considerable part of the house, and to introduce invidious distinctions where there ought to be perfect equality. Yet there has been no such violence exercised as has been formerly witnessed on much less provocation—no pulling up of benches or breaking of chandeliers—no bloodshed, or even breach of the peace. There is no pretence for denominating what the witnesses have described *a riot*. The people were only expressing, according to ancient usage, their sense of what they disapproved. The noise was great, but not greater than is frequently heard at the condemnation of a new play. Bells and rattles may be new to the pit, but cat-calls, which are equally stunning, are as old as the English drama. Nor can the legality of the scene depend upon the exact degree of noise which is made by the audience, but whether outrage is committed, whether terror is excited, and whether the object is laudable. If the managers remain obstinate and set at defiance milder expostulations, they must be brought back to their duty by louder remonstrances; and there seem no just limits to necessary resistance but a breach of the peace and a violation of property. The patentees do not hold the grant of the crown merely for their own emolument, but as the trustees of the public; and they are answerable to the public for the manner in which they execute the trust.—How could it be said that the defendant had instigated this supposed riot? Whatever it was, it raged as furiously before he entered the house as afterwards. He took no part in the disturbance, and instead of encouraging the supposed

supposed rioters, he prevailed upon a gentleman near him to desist from blowing a trumpet. By wearing O. P. in his hat, he simply expressed his opinion, that the old prices were sufficient and ought to be restored. If this were illegal, it would soon be a misdemeanor to wear a blue cockade at an election, or a white favour at a wedding. The conduct of Mr. Clifford while he remained in the pit was most exemplary.—But whatever difference of opinion there might be upon that subject,—suppose that he was there guilty of a riot and breach of the peace, the arrest was equally illegal. At any rate, the riot had ceased, and he had withdrawn from the scene of action. He might as well have been dragged from his bed by the defendant and the other servants of the house, and carried before a magistrate, a month after the supposed offence had been committed. But it is an established maxim of the law, that though a constable or a private person may interpose to prevent a breach of the peace, or carry before a Justice a person apprehended by them in the act of breaking the peace; yet when the affray is over, their power is gone, and they cannot arrest the offender without a warrant granted by a magistrate after an information laid before him upon oath. Therefore all the issues on the record must be found for the plaintiff. The defendant *was guilty* of the assault and false imprisonment laid to his charge, and guilty *without any such cause* as he has alleged in his pleas of justification.

*Shepherd*, Serjeant, spoke at great length for the defendant; but as most of his legal arguments were

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adopted by the CHIEF JUSTICE, it seems unnecessary to detail them.

Sir JAMES MANSFIELD, C.J.—The first great question for the consideration of the jury will be, whether the plaintiff was instigating a riot in *Covent Garden Theatre* on the evening in question? and then they must determine, whether he was arrested while the riot continued. As to the existence of a riot in the house, no doubt can be entertained. It appears that for a great many days past there were riots there of such a nature as to put an entire ~~altogether~~ to dramatic representation. I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessities of life, and any person may stay away who does not approve of the manner in which they are managed. If the prices of admission are unreasonable, the evil will cure itself. People will not go, and the proprietors will be ruined, unless they lower their demands. But the proprietors of a theatre have a right to manage their property in their own way, and to fix what prices of admission they think most for their own advantage. It is said, if the prices asked are considered too high, people have a right to express their disapprobation in the tumultuous manner they have adopted. From this doctrine I must altogether dissent. If the proprietors have acted contrary to the conditions of the patent, the patent itself may be set aside by a writ of *scire facias* in the Court of Chancery. The private

vate boxes furnish as little ground for violence. The house is the property of a certain number of individuals, to be used by them according to their own discretion. I conceive it quite impossible that any thing which has been done by the manager; in raising the prices, or making some of the boxes private, can be any sort of justification in point of law for such scenes as took place on the night in question—scenes which are a disgrace to the country, and which tend to bring us back to a state of barbarism. If questions of this sort are to be decided by multitudes of people assembled tumultuously, and behaving in such a manner as to prevent decent members of society from going to the theatre, there will be an end of the law. It is time for the public to understand, that the proceedings which have lately taken place at this theatre are in a high degree illegal, and that all those who participate in them are liable to be punished severely, in proportion to their offences. These premeditated and systematic tumults have been compared to that noise which has been at all times witnessed at theatres in the immediate expression of the feelings of the audience upon a new piece, or the merits or defects of a particular performer. The cases, however, are widely different. The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and

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and pre-concerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment. If people endeavour to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces. I am clearly of opinion that the scenes which have been described amount to a riot. How can it be said there was no terror? Would any of the jury allow their wives or daughters to go to the theatre during these disturbances? Must not those who entertain a different opinion upon the matters in dispute, and are friendly to the managers, expect to meet violent ill treatment?—The jury will consider, then, whether Mr. *Clifford* was an instigator of the riot, which one of his witnesses has represented as resembling a quarrel among a thousand drunken sailors. The law is, that if any person encourages or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. In this case, all are principals. It is not easy to conceive that the plaintiff had no intention to encourage the rioters. How happened it that at his entrance he was saluted with the exclamation, “Here comes the honest counsellor!” How had he deserved this peculiar panegyric? How came it that a word from him was sufficient to prevent a man from blowing a trumpet? For what purpose did he go to the theatre? Was it to see the play? Why did he wear

O. P.

O. P. in his hat? Did he not know the meaning of these letters; and if he did, with what view did he exhibit them but to encourage the mob by his example, and to impress upon them the idea they were acting agreeably to law? Upon all these circumstances the jury will exercise their judgments, and consider whether the plaintiff instigated the riot. If he in any way encouraged the rioters, he is guilty.— We now come to the moment of his apprehension. And the rule of law certainly is, that a private person cannot arrest another for a mere breach of the peace at a time subsequent to the commission of the offence, without a warrant from a magistrate. But there is some difficulty in determining when this power to arrest actually ceases. Here if the riot had been over a considerable time, and the plaintiff had taken the O. P. out of his hat hours before, and there appeared no immediate danger of the riot being renewed, Mr. Brandon had clearly no right to arrest him, without a warrant for his past offence. If, however, at the time of the arrest, the riot which the plaintiff instigated still continued, I think he may fairly be said, under these circumstances, to have been arrested at the time of committing the offence. There is a contrariety of evidence as to this point, upon which the jury must determine.—His Lordship concluded by requesting the jury to state their opinion separately as to the questions, whether the plaintiff had instigated the riot, and <sup>in notice,</sup> they had no direct <sup>they had no direct</sup> was over before the arrest, to whom they had neither <sup>wanted to give any.</sup> There could be

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**Clifford**  
 v.  
**Brandon,**

The Jury, after retiring some time, found a verdict for the plaintiff, with 5*l.* damages, and being pressed for their reasons, the Foreman said, they thought unanimously that the arrest was illegal; but some of them proceeded on the ground that the riot was over, and others that the wearing the letters O. P. in a theatre was not any instigation to riot.

*Best, Runnington, Serjeants, C. Warren and C. Runnington*, for the plaintiff.

*Shepherd, Lens, Serjeants, and Gurney* for the defendant.

[Attorneys, *Clarkson and Humphreys.*]

In the preceding term the Court of K. B. granted leave to file a criminal information against Mr. Clifford and several other gentlemen who were represented as promoting the disturbances in Covent Garden Theatre, for a *conspiracy*; but before Hilary Term, the managers agreed, on the new price

of admission to the boxes being allowed, to reduce the price of admission to the pit to its former standard, to throw open to the public all the private boxes beyond the number which had existed in the old theatre, and to drop all the prosecutions which they had commenced.

*Macklin*, the famous comedian, indicted several persons for a *conspiracy* to ruin him in his this peculiar panwere tried from him was sufficient and ing a trumpet? For what p*ro*p*ro* account of the trial. Why *was* *the* *play*? *Why* *were* *the* *theatre*? Was it to see the play?

O. T. 2

## ADJOURNED Sittings at GUILDHALL.

JAMESON and others v. SWINTON.

Wednesday,  
Dec. 13.

CTION by the second indorsees of a bill of exchange drawn by the defendant payable to his own order, and indorsed by him to *G. Elsom*.

The bill became due on Saturday the 8th of July, when it was in the hands of the plaintiff's bankers. On Monday the 10th, they returned it dishonoured to the plaintiffs, who in the evening of that day gave notice of the dishonour to *Elsom*, their indorser. *Elsom* between eight and nine o'clock in the evening of the following day, gave a like notice to the defendant. The plaintiffs and *Elsom* resided in *London*; the defendant at *Islington*. The question was, whether there was sufficient evidence of the dishonour of the bill to maintain the present action?

If the drawer or indorser of a bill of exchange receives due notice of its dishonour from any person who is a party to it, he is directly liable upon it to a subsequent indorser from whom he had no notice of the dishonour.

*Best*, Serjeant, for the defendant, insisted that the plaintiffs were bound to give notice themselves to the drawer and all the indorsers against whom they meant to have any remedy. They could not avail themselves of a notice given by a third person. Against *Elsom*, to whom they had given regular notice, they had a clear right of action; but they had no direct claim upon the defendant, to whom they had neither given notice nor attempted to give any. There could be nothing

1809.

JAMESON  
and others  
*v.*  
SWINTON.

nothing in the difficulty of giving notice to a great number of indorsers, as the indorsee either knew them and their address, or he trusted entirely to the credit of the person from whom he received the bill. Besides, the defendant had not even received due notice of the dishonour of the bill from *Elsom*. As the parties all resided in London, or the immediate vicinity, the defendant was entitled to notice before 8 or 9 o'clock in the evening of the third day after the bill was dishonoured.

LAWRENCE J.—I do not remember to have heard the first point made before; but I am of opinion that the drawer or indorser is liable to all subsequent indorsees, if he had due notice of the dishonour of the bill from any person who is a party to it. Such a notice must serve all the purposes for which the giving of notice is required. The drawer or indorser is authoritatively informed that the bill is dishonoured, he is enabled to take it up if he pleases, and he may immediately proceed against the acceptor or prior indorsers.—And it does seem to me that the defendant in this case had due notice of the dishonour of the bill from *Elsom*. This is allowing only one day to each party, which, where the parties all reside in the same town, seems now to be the established rule.

Verdict for the plaintiff.

*Shepherd, Serjeant, and Selwyn*, for the plaintiff.

*Best, Serjeant*, for the defendant.

# CASES

ARGUED AND DECIDED AT

**N I S I P. R I U S**

IN K. B.

*At the Sittings in and after Hilary Term,  
50 GEORGE III.*

FIRST SITTINGS IN TERM AT WESTMINSTER.

1810.

**DAVR v. HARDACRE.**

Saturday.  
Jan. 27.

THIS was an action by the indorsee of a bill of exchange drawn by the defendant payable to his own order. The bill was dated 20th February 1809, for 700*l.* at 8 months after date.

In an action on a bill of exchange, if it appear that the plaintiff discounted it for the defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff to prove, that the goods were of the value at which they were estimated, for the purpose of rebutting the presumption that the transaction was *usurious*.

A *prima facie* case being made for the plaintiff,—*usury* was set up as a defence to the action. And it appeared that the defendant being much pressed for money, applied to the plaintiff to discount the bill in question. The plaintiff refused to do so, except upon the following conditions: that the defendant should take a banker's cheque for 250*l.* a promissory note at 2 months for 286*l.* 12*s.* and a landscape in imitation

1810.

DAVIS

v.

HARDACRE.

tion of *Poussin* to be valued at 150*l.* The defendant agreed, that the bill was discounted accordingly.

*Marryat* for the defendant then offered to prove that the plaintiff had himself purchased the picture for 32*l.* and that this was its full value.

Lord ELLENBOROUGH.—I think it lies upon the plaintiff to prove that it is worth 150*l.*

*Garrow* for the plaintiff said he was not prepared with evidence of the value of the picture; but contended that if the defendant was to make this an usurious transaction, the *onus* was thrown upon him of proving that a grossly extravagant and colourable price had been set upon the article—as had been done with respect to the ostrich feathers, which were proved to be sold and re-purchased by the same money-lender several times in the same day.

Lord ELLENBOROUGH.—Where a party is compelled to take goods in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. To rebut this presumption, evidence should be given of the value of the goods by the person who sues on the bill. In the present case I must require such evidence to be adduced: and I wish it may be understood that in similar cases, this is the rule by which I shall be governed for the future. When man goes to get a bill discounted, his object is to procure cash, not to encumber himself with goods. Therefore, if goods are forced upon him, I must have proof that they were estimated at a sum for which he could

render them available upon a re-sale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them. Can you shew that the defendant could have sold your imitation of *Poussin* for 150*l.*?

1810.  
DAVIES  
v.  
MARDACRE.

*Garrow* allowed that though the rule just laid down by the CHIEF JUSTICE might bear hard against his client in this particular instance, its general operation would be most salutary.

Plaintiff nonsuited.

*Garrow and Best*, for the plaintiff.

*Marryat and Tindal*, for the defendant.

[Attorneys, *Stokes and Wood*.]

Where goods are delivered to a person who wishes to raise money, a court of equity will set aside the security, on pay-

ment of the sum which the goods actually fetch when resold. See *Barker v. Vansomer*, 1 Bro. C. C. 149.

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 SECOND SITTINGS IN TERM AT WESTMINSTER.
 

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Friday,  
Feb. 2.

MILMAN v. DOLWELL.

To trespass for unmooring the plaintiff's barge the defendant int. laying, pleaded merely the *general issue*, cannot give in evidence that he re moved it from a situation of danger by the plaintiff's authority, or that being frozen to the barge of a third person which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of safety.

THIS was an action of trespass for cutting the plaintiff's barges from their moorings in the river Thames; whereby they had been set adrift and been injured.

It appeared that at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were moored, to the opposite shore, and that one of them was immediately after discovered to have a hole in its bottom, but there was no evidence to shew how this had been occasioned.

*Garrow* for the defendant offered to prove, that at the time of the supposed trespass, these barges were in the greatest danger of being carried away by the ice; that if he had not interfered, they most probably would have been destroyed; that he did what was most prudent and most for the plaintiff's advantage to be done under the circumstances; and that he had been employed by the plaintiff generally to take charge of the barges, and must be presumed to have had his authority to remove them from a place of danger to a place of safety.

**Lord ELLENBOROUGH.**—These facts should have been specially pleaded. I cannot admit evidence of them under the plea of *not guilty*;—the issue joined upon which is, whether the defendant removed barges belonging to the plaintiff from their moorings, not whether he was justified in doing so.

1810.

MILWELL,

S.

DOLWELL.

*Garrow* argued that the plea of *not guilty* merely denied the committing of any trespass, and it was impossible to say that any trespass was committed, if the barges were removed by the plaintiff's own orders either express or implied. The case was the same as if the plaintiff had stood by and directed how the thing was to be done, and the unmooring of the barges must be considered the act of the plaintiff rather than of the defendant.

**Lord ELLENBOROUGH.**—The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is presumed to be a trespasser; and, if he has any matter of justification, he must put it upon the record. The plea of *not guilty* only denies the act done, and the plaintiff's title to the subject of the trespass. If the defendant has any authority, general or particular, express or implied from the plaintiff, this must be specially pleaded, by way of excuse.

*Garrow* then offered to prove that these barges were frozen to some others belonging to J. S., by whom the defendant was employed to get the latter ashore, and that it was utterly impossible to do this without bringing the former along with them.

1810.  
 MILMAN  
 v.  
 DOLWELL.

**Lord ELLENBOROUGH.**—If the necessity was inevitable, and the barges of the third person by whose express orders the defendant acted, must otherwise have been destroyed, this might have amounted to a justification; but, like the first set up, it must have been put upon the record.

The Jury found a verdict for the plaintiff, with *one farthing* damages.

*Garrow* afterwards moved for a new trial, on the ground that the evidence had been improperly rejected; and further contended, that the action should have been case and not trespass: but the court were against him on both points, and refused a rule to shew cause.

*Park, Jekyll, and Lawes*, for the plaintiff.

*Garrow and Topping* for the defendant.

[Attorneys, *Evans and Hill*.]

*Vide* Cem. Dig. Pleader (3 M. 20...39.) Bul. N. P. 90.

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 SECOND Sittings in London.
 

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BEVAN, Widow, v. HILL.

Saturday,  
Feb. 3.

*INDEBITATUS assumpsit* for stock bargained and sold, and for money had and received. Plea the general issue.

On the 27th of February, 1809, the defendant purchased 70l. 5 per cents. belonging to the plaintiff for 69l. 7s. 6d., and the same day gave her a cheque for that sum on his bankers, Messrs. *Walpole and Co.* She lost the cheque on her way home from the Stock Exchange. He was immediately apprized of this fact, and at various times down to the month of June following was requested to pay for the stock; but he always refused to do so, unless he had an indemnity against his liability on the cheque. Messrs. *Walpole and Co.* became bankrupts in the month of May, in the same year, without the cheque having ever been presented for payment. The defendant proved for the amount of the cheque under their commission; but had not received any dividend at the time when the action was commenced.

A cheque given for stock sold is lost by the vendor in going home from the Stock Exchange; The purchaser is immediately informed of this fact, but refuses to pay without an indemnity: Four months after, the bankers on whom the cheque was drawn stop payment, with sufficient money to answer it of the drawer's in their hands—*Held*, that under these circumstances an action would not lie for the price of the stock.

*Garrow* for the plaintiff insisted that the cheque could not operate as payment of the stock, and that the defendant was still bound to pay the 69l. 7s. 6d. without receiving any indemnity. Long before the

1810.

BEVAN  
v.  
HILL.

commencement of the action, he had ceased to be liable on the cheque. According to the principle of *Tindal v. Brown*, 1 T. R. 167, after the bankruptcy of *Walpole and Co.* a holder of the cheque could not have maintained an action upon it against the drawer, and even in a short time from the loss of the cheque, and while *Walpole and Co.* continued to pay, it must have come into the hands of any person under circumstances of such suspicion, that *Brown* could not have been sued upon it, if he had withdrawn the money from the bankers, and paid it to the plaintiff.

**Lord ELLENBOROUGH.**—It is certainly possible that this cheque may have got into the hands of a person who might maintain an action upon it. The very day it was lost it might have been passed for value to a *bona fide* holder without notice. I therefore think the defendant was entitled to an indemnity. He could not, without this, have safely withdrawn the money from *Walpole and Co.* before their bankruptcy. He then ceased to be liable upon the cheque, but the money was gone. Besides, the bankruptcy of *Walpole and Co.* may not be sustainable, and the defendant is not to be exposed to the risk of the commission being superseded.

Plaintiff nonsuited.

*Garrow and Wigley* for the plaintiff.

*Marryat* for the defendant.

[*Attornies, Dixon, and Gregson & Dixon.*]

*Vide Pearson v. Hutchinson, ante 211.*

FIRST

## FIRST Sittings AFTER TERM AT WESTMINSTER.

BRADLEY v. GREGORY.

Tuesday,  
Feb. 13.

**T**HIS was an action for goods sold and delivered.  
**P**lea, the general issue.

The original existence of the debt demanded being admitted, the defence was rested on the following facts :

In April 1808, after the sale and delivery of the goods in question, the defendant having fallen into embarrassed circumstances, a meeting of his creditors was called. This was attended by the plaintiff, and it was agreed by all present, that if a statement the defendant then made was correct, they would accept of a composition and give him a release. Two or three of the creditors were appointed to inspect his books, and the meeting was adjourned to the next day. The plaintiff did not assist at the following meeting; but from the report then made of the defendant's affairs, all the creditors present consented to take a composition of 10s. in the pound on their respective debts, 7s. to be secured by the acceptances of *J. Broxup* at one and three months, and the remaining 3s. to be paid by the defendant's own notes at 9, 12, and 15 months; and on these securities being given, they were to execute a composition deed, containing a clause

Where a man's creditors agree to take a composition on their respective debts, to be secured partly by the acceptances of a third person, and partly by his own notes, and to execute a composition deed containing a clause of release, he cannot be sued for the original debt due to a creditor who had promised to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refused to execute the composition deed after it had been executed by all the other creditors.

1810. clause of release. The next morning, the defendant's attorney, before the drawing of the promissory notes, or the deed was begun to be prepared, waited upon the plaintiff to know whether he would come in under this arrangement. The plaintiff said he was extremely glad it had been agreed to by the others, and promised to accept of the composition and to execute the deed. The deed was accordingly prepared and executed by the other creditors, and a tender was made to the plaintiff of bills accepted by *Brockup* for 7s. in the pound, and of the defendant's own notes at the above dates for the remaining 3s. upon the sum which the plaintiff had himself stated as the amount of his debt. But he now refused to accept of the bills and notes or to execute the deed.

*Park* for the defendant contended that after this agreement the present action could not be maintained, and relied upon *Butler v. Rhodes* 1 *Esp. N. P. Cas.* 236.

*Garrow* and *Richardson*, *contra*, maintained there was no case in which an executory agreement to accept a composition had been held to extinguish a debt. This was accord without satisfaction. However the plaintiff might *in foro conscientia* be bound by his promise, and whatever effect might be given to it in a court of equity, yet at law, it could not be a bar to an existing right of action. In *Fitch v. Sutton*, 5 East. 230, where the composition had been received, the Court decided that the original debt was not extinguished; and in the late case of *Steinman v. Magnus*, 11 East,

390, 2 *Campb.* 124. in which it was held, that after a composition guaranteed by a third person has been actually received, the creditor cannot maintain an action for the residue of his demand, it seemed to be allowed on all hands that the mere agreement to receive a composition would have been no bar. In *Butler v. Rhodes* the defendant had been induced to assign the whole of his property to a trustee, and was left without any means to satisfy the plaintiff's demand.

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Lord ELLENBOROUGH.—I think the agreement in the present case operates as satisfaction. The defendant undertook to procure the acceptances of a third person for 7s. in the pound; to give his own notes for 3s. more; to prepare a composition deed with a clause of release; and to procure the other creditors to execute it. The plaintiff undertook to accept of the composition, and to sign the composition deed. There was clearly a good consideration for this promise moving from the defendant to the plaintiff, as well in the benefit the latter was to receive, as in the inconvenience the other was to suffer. But it is said this agreement is executory, and therefore can be no bar. I think it is executed. Every thing on the defendant's part was performed. As far as depended upon him, there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for. Accord is no bar without satisfaction; but a party is not to be permitted to say there is no satisfaction, to whom satisfaction has been tendered

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*v.*  
GREGORY.

dered according to the terms of the accord. It would be most unjust if the defendant could be sued in this action, and I am of opinion that in point of law the action is not maintainable.

Plaintiff nonsuited.

*Garrow and Richardson*, for the plaintiff.

*Park and Espinasse*, for the defendant.

[Attorneys, *Wilson and Fillingham*.]

But although a creditor agree to take a composition, on a false representation that if he would compound, all the other creditors would do so likewise, if any of the others stand out, he is not bound by the agreement. *Cooling v. Noyes*, 6 T. R. 263. And an agreement between a debtor and his creditors, that

they will accept a composition in satisfaction of their debts, if no fund be appropriated for the purpose of paying them, is *nullum pactum*, and cannot be pleaded to an action brought by one of the creditors for his whole demand. *Heathcote v. Crookshanks*, 2 T. R. 24.

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FIRST Sittings AFTER TERM IN LONDON.

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DOE ex. d. ASH and another, v. CALVERT.

Wednesday,  
Feb. 14.

THIS was an ejectment by landlords against tenant, to recover the possession of a house situate in *Gutter Lane, Cheapside*.

The demise was laid on the 29th June 1809, and the lessors of the plaintiff relied upon a notice to quit which expired on Midsummer day preceding.

Where rent is usually paid to a banker's, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waved.

The first question which arose was, whether the notice to quit had not been waved by a subsequent receipt of rent. It appeared that the rent for the premises had for several years been received by *Messrs. Gordon and Co.* on account of the landlord, and that a clerk of theirs at Michaelmas 1809 received a quarter's rent due for the quarter which then expired; but that he was then ignorant of the notice to quit having been given, or the ejectment having been brought, and that he accepted the rent without any special authority, imagining that matters remained between the parties on their former footing. There was no evidence of the rent having come to the hands of the lessors of the plaintiff.

Park

1810.

Doe  
ex d. Ash  
and another  
v.  
CALVERT.

*Park* for the defendant insisted that the lessors of the plaintiff were bound by the act of their agent, and that there was here an unequivocal acknowledgment of the tenancy subsequent to the day of the demise.

**Lord ELLENBOROUGH.**—The receipt of the rent due at Michaelmas is *prima facie* a waiver of the notice to quit at Midsummer. But since it appears that this rent was received by an agent ignorant of the steps taken by his principal to determine the tenancy, and without any special authority to receive it, I am of opinion that the notice to quit remains in full force. If rents are usually paid at a banker's, it would be too much to say that a tenancy is acknowledged by the banker receiving rent for the premises in the common routine of business after a notice to quit has expired (a).

A difficulty then arose to prove that this was a Midsummer holding.

A notice to quit is not *prima facie* evidence of the period of the year when the tenancy commenced.

*Garrow*, for the lessors of the plaintiff, submitted that it must *prima facie* be taken to be so, because the notice to quit expired at that period of the year.

**Lord ELLENBOROUGH.**—It was once most improperly so held; but now I believe I may say all the

(a) *Vide Doe v. Batten*, Cowp. 243. *Ward v. Willingale*, 1 H. Bl. 311. *Goodright v. Cordwent*, 6 T. R. 219. judges

judges are of a contrary opinion. To make the party's own act evidence in his favour is contrary to first principles (*a*).

To shew the exact time when the defendant entered, it became necessary to prove the will of one *John Purcel*, who died seized in fee of the premises above 40 years ago. It was stated that he had devised them to his widow for life, and that she had demised them to the defendant by a lease which became void upon her death. The lessors claimed as devises in trust of *Richard Purcel*, the brother of *John*, and remainder-man in fee after the life estate to the widow.

A Clerk from Doctor's Commons swore that he had searched in the proper place where the original will of *John Purcel* ought, according to its date, to have been found, but that it was no where to be discovered, and that he believed by some accident it was lost.

*Garrow* then tendered as secondary evidence the probate of the will under the seal of the ecclesiastical court.

**Lord ELLENBOROUGH.**—This is inadmissible. In the absence of the original will we should have had an examined copy. I cannot attach any authority to the probate as far as the will relates to real estate. A

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Doe  
ex d. Ash  
and another  
v.

CALVERRT.

A will of lands  
being lost, the  
probate is not  
admissible as  
secondary evi-  
dence of its  
intent.

1810.

Doe  
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and another  
v.  
CALVERT.

will of lands does not require to be proved at all, and the ecclesiastical court has no controul over it. Therefore to shew that this is a true copy, we have only the seal of a court without jurisdiction upon the subject. The probate of a will devising real property is not like an office copy, which proves itself; for office copies that are received in evidence, are delivered out by officers appointed for the purpose as the organs of courts of competent jurisdiction.

Plaintiff nonsuited.

*Garrow and Puller*, for the lessors of the plaintiff.

*Park and Espinasse*, for the defendant.

[Attorneys, Hunt and Earnshaw.]

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In a case before Wood, B. at the last *Worcester Assizes*, on proof that a will of lands had been lost, parol evidence of its contents was received from a witness who heard it read over before the testator's family on the day of his funeral.

## HOLCOMBE v. HEWSON.

Wednesday,  
Feb. 14.

**T**HIS was an action of assumpsit by a brewer against a publican, on an agreement whereby it was stipulated that the defendant should take all his beer of the plaintiff, and that if he did not, he should pay an advanced rent for the house which he occupied.

*Garrow* for the plaintiff allowed (which was confirmed by Lord ELLENBOROUGH) that if it should appear that the beer supplied by the plaintiff to the defendant while they dealt together, was not of a fair merchantable quality, and such as ought to have given satisfaction to the defendant's customers, the present action could not be maintained.

To prove its excellence, the plaintiff's foreman was called, and stated that it was made of malt and hops only.

*Garrow* then proposed to call several other publicans who dealt with the plaintiff at the same time with the defendant, and since the latter had taken his beer of another brewer, to swear that they were supplied with an excellent commodity, which was highly approved of by their customers.

**Lord ELLENBOROUGH.**—This is *res inter alios acta*. We cannot here enquire into the quality of different beer

An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the ~~latter~~ supply the publican with good beer, such as ought to give satisfaction to his customers. In an action on this agreement, the quality of the beer cannot be proved by shewing what sort of a commodity the brewer furnished to other publicans during the same period.

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v.
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beer furnished to different persons. The plaintiff might deal well with one and not with the others. Let him call some of those who frequented the defendant's house, and there drank the beer which he sent in, or let him give any other evidence of the quality of this beer; but I cannot admit witnesses to his general character and habits as a brewer.

The defendant afterwards proved that the beer supplied to him by the plaintiff was very bad, and that he had lost almost the whole of his customers before he began to deal with another brewer; since which he has carried on a thriving trade.

The plaintiff submitted to be nonsuited.

Garrow and Marryat for the plaintiff.

Park and Paley for the defendant.

[Attorneys, *Townshend and Hodgson.*]

ADJOURNED SITTINGS AT WESTMINSTER.

CHAMBERS, Esq. v. EAVES.

Saturday,
Feb. 17.

TRRESPASS for distraining a horse, and keeping the same till the defendant paid 22*l.* for the release thereof.—Plea *not guilty.*

The plaintiff has a farm at *Enfield*; and on the 19th of December last he sent a waggon from thence to London, carrying, among other things, a basket filled with vegetables, and two bottles, one containing milk, the other cream, all the produce of the farm. The waggon having delivered these things at the plaintiff's house in town, took in a heavy load of dung to be carried back to Enfield, and the basket and bottles before mentioned being empty, were tied to the fore part of it with a hay rope.

A waggon returning from London loaded with dung is not liable to be weighed and charged for overweight under r. 13 G. 3, c. 34, or 14 G. 3, c. 82, by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day.

When the waggon on the afternoon of the same day reached the *Istington* turnpike on its way home, the defendant, who collects the tolls there, insisted upon its being weighed. It was weighed accordingly, and found to be 35 cwt. above the statute weight. The defendant thereupon distrained one of the horses for the sum mentioned in the declaration, which he received next day from the plaintiff, when the horse was released. The question was, whether the waggon

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LAWES.

ought to have been weighed on its way home, under these circumstances?

Stat. 14 G. 3. c. 82. § 3. enacts, "that no waggon, cart, or carriage employed only in husbandry, or carrying only manure or lime for the improvement of land, or hay, straw, fodder or corn unthrashed (excepting hay or straw carried for sale) shall be weighed at any weighing engine now or hereafter to be erected (a)."

Garrow for the defendant contended that the waggon carrying the empty basket and bottles as part of its load, did not come within the exemption. The words of the statute are "employed *only* in husbandry, or carrying *only* manure or lime." If the basket and bottles might be carried empty, without rendering the waggon liable to be weighed, so might they when full; and it would *conse* to this, that every carriage would be exempted which carried any portion of manure as a part of its load.

* Lord ELLENBOROUGH.—If the waggoner's frock were thrown over a waggon loaded with manure, would that render it liable to be weighed? If not, it is not every thing that is carried besides the manure which will subject the owner of the waggon to the additional duty. We must look to the clause by which this is imposed. Statute 13 G. 3. c. 84. § 1. enacts, that it shall and may be lawful for the trustees of any turnpike road "to order and cause to be built

(a) And see 13 G. 3. c. 84. s. 6.

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or

or erected a crane, machine or engine proper for the weighing of carts, waggons or carriages, conveying of *any goods or merchandize* whatsoever." Then can the empty basket and bottles be considered goods and merchandize within the meaning of the act of parliament? I think not. Care must be taken that the act is not evaded; but if the load substantially consists of manure, and manure only, the exemption will not be defeated by an article being tied to the waggon which cannot be considered as goods and merchandize, and which cannot produce the mischief against which the legislature meant to provide.

Verdict for the plaintiff.

Topping and Abbott for the plaintiff.

Garrow, Marryat, and Richardson for the defendant.

[Attorneys, *Dewbury and Pinero.*]

Vide Harrison v. Brough, 6 T. R. 706.

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CHAMBERS
v.
EAVES.

Saturday,
Feb. 17.

WRIGHT v. WALMSLEY.

Although it be irregular to bring an action on a bail bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of *non est factum*.

THIS was an action of debt on a bail bond conditioned for the defendant's appearance in the Palace Court.—Plea, *non est factum*.

Park contended, that the plaintiff must be nonsuited, as by 4 Ann. c. 16, the action could only be maintained in the Palace Court, and he relied upon *Donatty v. Barclay*, 8 T. R. 152.

Lord ELLENBOROUGH.—It is undoubtedly settled that an action on a bail bond should be brought in the court where the writ was returnable on which the party was arrested. That is the only court authorized by the statute to give in a summary manner “such relief to the plaintiff, the defendant, and to the bail as is agreeable to justice.” Therefore, the plaintiff is irregular in bringing an action in the King’s Bench on a bail bond taken on process out of the Palace Court. But how am I to get at this under the plea of *non est factum*. The bond is the deed of the defendant, and is a valid deed. On a summary application to the court, proceedings might have been stayed, or perhaps the matter might have been taken advantage of by a special plea. The only issue we

have now to try, however, is whether this be the defendant's deed? It is proved to be so, and there must be a—

Verdict for the plaintiff.

Garrow and Lawes for the plaintiff.

Park and Reader for the defendant.

[*Attorneys, Willoughby and Bellamy.*]

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But the sheriff may sue on a bail bond, in a different court from that in which the original action was brought. *Newman v. Faucitt*, 1 H. Bl. 631.

PRIDE, *q. t. v. STUBBS.*

Thursday,
Feb. 22.

THIS was an action of debt on 5 Eliz. c. 4. for setting to work, in the business of a coachmaker, a person who had not served therein seven years as an apprentice.

An action will not lie on 5 Eliz. c. 4. for setting to work a person who had not served an apprenticeship in the business of a coach-maker, that business not being known in England when the statute passed.

The case being opened by the plaintiff's counsel,

Lord ELLENBOROUGH said he was clearly of opinion the action could not be maintained, as the trade of a coachmaker did not exist in England in the 5th of Elizabeth (a). The queen went on horseback to open

(a) 1562.

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the very parliament at which this statute passed; and she used frequently afterwards, on occasions of state, to ride behind the *Earl of Leicester*.

Plaintiff nonsuited.

Garrow and Lawes for the plaintiff.

Park and Selwyn for the defendant.

Coaches were used on the continent of Europe in the beginning of the 16th century; but were not known in England till the middle of Elizabeth's reign. According to *Stow*,

they were introduced from Germany by the *Earl of Arundel*.

Vide Coward v. Maberley, ante, 127. and the cases there referred to.

Sunday,
Feb 21.

REX, v. LAMBERT and PERRY.

It is not libellous for a writer who allows the government to be solditor for the welfare of his subjects, and who has no intention of calumniating him or bringing his person or government into public odium, to ex-

THIS was an information filed *ex officio* by the Attorney General against the printer and proprietor of the Morning Chronicle newspaper, which charged that they "being seditious, malicious, and ill disposed persons, and being greatly disaffected to our present sovereign Lord, George the Third, &c. and to his administration of the government of this kingdom, and

press regt. that On the trial of an in evidence any libelous although he has taken an erroneous view of any question of foreign or domestic policy,—information for a libel in a newspaper, the defendant has a right to have read extract from the same paper connected with the subject of the passage charged as digressed from it by extraneous matter and printed in a different character.

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most unlawfully, wickedly, and maliciously devising, designing, and intending, as much as in them lay, to bring our said Lord the King and his administration of the government of this kingdom, and the persons employed by him in the administration of the government of this kingdom, into great and public hatred and contempt among all his liege subjects: and to alienate and withdraw from our said Lord the King the cordial love and affection, true and due obedience, fidelity, and allegiance of the subjects of our said Lord the King; on &c. at &c. did unlawfully, seditiously, and maliciously print and publish, and cause, &c. a certain scandalous, malicious, and seditious libel of and concerning our said Lord the King and his administration of the government of this kingdom, to the tenor and effect following, that is to say, '*What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system! Of all monarchs indeed since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular:*' To the great scandal, &c."

The defendants admitted that the paragraph set out in the information as a libel, was published by them in the Morning Chronicle of 2d October 1809.

Mr. Perry, who conducted his defence in person, wished another paragraph from the same paper to be read, by way of explaining the supposed libel. The paragraph now proposed to be read was at a considerable distance from the other, and printed in a different type, and there was some intelligence between the two

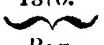
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of a totally extraneous nature, concerning the arrival and departure of fleet, &c.

The *Attorney-General* observed that the paragraph pointed out could only be read *ex gratia*.

Lord ELLENBOROUGH.—If there be any parts of the same paper upon the same topic with the libel, or fairly connected with it, the defendants have a right to their being read, although locally disjoined from it. I cannot admit any thing totally foreign to the subject of the record to be read or made applicable to the defence. But passages of the same paper tending to shew the intention and mind of the defendants with respect to this specific paragraph, must be very material for the consideration of the jury. On the trial of Mr. Horne Tooke for high treason, the matter was carried much farther. The prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life, and these the jury were permitted to carry along with them when they retired to consider of their verdict. I am not prepared to say that I should go so far. I entertain the highest deference for the judges who presided on that occasion, and their authority is entitled to the greatest weight; but, if the point should ever arise before me, it would become my duty seriously to consider whether such evidence should be admitted. Here, however, I feel no hesitation. The passage alluded to will deserve more or less attention according to its connexion with the subject matter of the libel; but its local situation

situation and the character in which it is printed furnish no ground of objection to its being read.

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An extract was read accordingly, which concluded as follows: "The prince has thought it his duty to "express to his Majesty his firm and unalterable "determination to preserve the same course of neutrality which he has maintained, and which, from "every feeling of dutiful attachment to his Majesty's "person, *from his reverence of the virtues, and from his confidence in the wisdom and solicitude of his Royal Father for the happiness of his people,* he is "sensible ought to be the course that he should "pursue. We have no doubt that this assurance "of the filial respect of the HEIR APPARENT, in not "interposing his high influence in the forming of an "administration, will be most acceptable to his Majesty."

Lord ELLENBOROUGH in summing up to the jury, after commenting upon the weight to be given to this extract, which he thought ought to have been considerable, if it had stood near the passage complained of, and they had formed parts of the same discussion, but which was greatly diminished by their distance from each other, and the matter interposed between them—proceeded to say: The next and most important question is, what is the fair, honest, candid construction to be put upon the words standing by themselves? Is the passage set out in the information, *per se* libellous? The first sentence easily admits of an innocent interpretation. "What a crowd of blessings rush upon one's mind that might be bestowed upon the coun-
try

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"try in the event of a total change of system?" The fair meaning of the expression, "*change of system*," I think is, a change of political system---not a change in the frame of the established government---but in the measures of policy which have been for some time pursued. By total change of system is certainly not meant *subversion* or *demolition*; for the descent of the crown to the successor of his Majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed on the accession of the Prince of Wales: and therefore cannot be understood to allude to a change inconsistent with the full vigour of the monarchical part of the constitution. Now I do not know that merely saying, there would be blessings from a change of system, without reference to the period at which they may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his Majesty, and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues on the part of the reigning Sovereign. He may be misled by the ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know but of ONE BEING to whom error may not be imputed. If a person who admits the wisdom and the virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate

uate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step farther, and say, or insinuate, that his Majesty acts from any partial or corrupt view, or with an intention to favour or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of Government obtains under his Majesty's reign I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits.—Then comes the next sentence: “ Of all monarchs indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.” This is more equivocal; and it will be for you, gentlemen of the Jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. Now, do these words mean that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the

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passage only means that his Majesty, during his reign, or any length of time, may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy—if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel. The extract read at the request of the defendants, does seem to me too remote in point of situation in the newspaper, to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to shew the innocence of the whole. It speaks of that which every body in his Majesty's dominions knows, his Majesty's solicitude for the happiness of his people, and it expresses a respectful regard for his paternal virtues. What connexion it has with the passage set out in the information, it is for you to determine. Taking that passage substantively and by itself, it is a matter, I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august Sovereign. If you are satisfied that this was his intention by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants *guilty*. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention; or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place and disjoined by

by other matter, you infer from that connexion that this was written without any purpose to calumniate the personal government of his Majesty, and render it odious to his people, you will find the defendants *not guilty*. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears to me most material is the substantive paragraph itself; and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly according to your reasoning, to impute any purposed mal-administration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men. I will take the instance of a man, who for a time administered the concerns of this country with great ability, although he gained his elevation with great crime—I mean, OLIVER CROMWELL. We are at this moment suffering from a most erroneous principle of his government in turning the balance of power against the Spanish monarchy in favour of the House of Bourbon.

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He thereby laid the foundation of that ascendancy which, unfortunately for all mankind, France has since obtained in the affairs of Europe. The greatest monarchs who have ever reigned—monarchs who have felt the most anxious solicitude for the welfare of their country, and who have in some respects been the authors of the highest blessings to their subjects, have erred. But could a simple expression of regret for any error they had committed, or an earnest wish to see that error corrected, be considered as disparaging them, or tending to endanger their government?—Gentlemen, with these directions the whole subject is for your consideration. Apply your minds candidly and uprightly to the meaning of the passage in question; distort no part of it for one purpose or another; and let your verdict be the result of your fair and deliberate judgment.

Verdict not guilty.

The *Attorney-General, Garrow, Abbott, and Richardson* for the Crown.

[*Attorneys, Litchfield and Lowden.*]

ADJOURNED

ADJOURNED SITTINGS IN LONDON.

SKRINE v. ELMORE.

Monday,
Feb. 26.

ACTION on the warranty of a horse.

To prove the warranty, the plaintiff gave in evidence a written instrument signed by the defendant, which had a receipt stamp, and contained a receipt for the price of the horse, with the words subjoined, "*warranted sound.*"

A Receipt for the price of a horse containing a warranty of soundness may be read in evidence to prove the warranty, without an agreement stamp.

The defendant's counsel objected, that it could not be read in evidence for the purpose of proving the warranty, without an agreement stamp.

Dampier of counsel for the plaintiff said, Mr. Justice LAWRENCE had ruled that such a receipt might be received in evidence to prove the warranty, as well as the payment of the price of the horse, if it had a receipt stamp merely; as the warranty came within the exception in the 4th section of 2 Geo. 3. c. 58, being an agreement "relating to the sale of goods, wares, and merchandizes." (a).

(a) Brown v. Frye, Devon Sum. Ass., 1809.

1810.

SKRINE
v.
ELMORE.

Lord ELLENBOROUGH assented to this doctrine when the receipt was found to have both a receipt stamp and an agreement stamp.

Garrow and Dampier for the plaintiff.

Park for the defendant.

[*Attorneys, Sands and Fielder.*]

So a written agreement by a broker who buys goods for his principal to indemnify him for any loss arising on the re-sale, need not be stamped. *Curry v. Edmison*, 3 T. R. 524. But an agreement for goods to be

made, or the produce of land to be grown, does not come within the exemption. *Buxton v. Bedall*, 3 East 303. *Waddington v. Bristow*, 2 Bos. & Pul. 452.

Monday,
Feb. 26.

HENKIN v. GERSS.

An action can-
not be main-
tained on a
wager on a point
of law in which
the parties have
no interest.

THIS was an action of assumpsit on a wager, “whether a person may be lawfully held to bail on a special original for a debt under 40*l.*”

The pleadings being opened,—

Lord ELLENBOROUGH requested to see the record, and having perused it, he threw it down with much displeasure, saying,—I certainly will not try this cause. Let either party apply to the Court next term if any one thinks that it is a cause fit to be tried. I sit here to

to decide points of law that arise incidentally before me, and the decision of which is necessary for the purposes of justice; not to state my opinion upon any question submitted to me from idle curiosity. I have no difficulty in saying, that an action will not lie on a wager on a point of law in which the parties have no interest. If any legal question could be raised in this manner for judicial determination, the inconvenience would be intolerable; and I consider the attempt extremely indecent.

In the ensuing Term, *Park* on behalf of the plaintiff submitted to the Court, that as the bet was not immoral, the action was maintainable, and the cause ought to be tried.—But

The Judges all agreed that the parties having no interest in the point of law, the action could not be maintained, and that the trial had been properly stopped.—They refused, however, to grant a rule for judgment as in case of a nonsuit, as there had been no default on the part of the plaintiff in not proceeding to trial.

Park and *Puller* for the plaintiff.

Garrow for the defendant.

So a cause coming on to be tried before Lord ~~Brougham~~, in which the plaintiff declared on a wager, “whether there are more ways than six of nicking seven on the dice, allowing seven to be the main,”

“and eleven ~~nick~~ to seven,” his lordship ordered it to be struck out of the paper, and the Court of C. P. afterwards refused leave to restore it. *Brown v. Leeson*, 2 H. Bl. 43.

1810.

HENKIN
v.
GRASS.

Thursday,
March 1st

ADLINGTON v. APPLTON.

*
 Where an action
 is brought to
 recover the ba-
 lance of an ac-
 count, a parti-
 culiar of the plain-
 tiff's demand
 delivered under
 a judge's order
 ought to give
 the defendant
 credit for pay-
 ments admitted
 to have been
 made by him,
 and to state the
 exact sum which
 the plaintiff goes
 for.—
 If an attorney
 delivers a par-
 ticular contain-
 ing only the
 debtor side of
 the account, he
 may be made to
 pay the costs
 subsequently
 incurred in the
 action.

THIS was an action for work and labour, to re-
 cover a sum of about 10*l.*, being the balance of
 an account of long standing between the parties.

Under a Judge's order, the plaintiff had delivered a particular of his demand, which contained an account for business done to the amount of 200*l.* but gave the defendant no credit for payments now admitted to have been made.

*
 Lord ELLERBOROUGH.—This particular is a con-
 tempt of the authority of the Court. The plaintiff was
 bound to state the precise sum he sought to recover,
 and for this purpose to have given the defendant
 credit for all payments made on account. Such a
 particular misleads the defendant, instead of giving
 him the information to which he was entitled. Had
 he known that a balance of 10*l.* was all the plaintiff
 went for, he might very probably have paid that sum
 into Court. It is most unjust that under these cir-
 cumstances the defendant should be burthened with
 the costs of the action. I think it right that the
 plaintiff should take a verdict for his balance, without
 costs. If this is not agreed to, I will direct an ap-
 plication

plication to be made to the Court, who will most likely order the plaintiff's attorney to pay the costs on both sides.

1810.

ADELINGTON

v.

APPLETON.

The proposal was accepted.

Adolphus for the plaintiff.

Park for the defendant.

GREEN and others, Assignees, &c. v. JONES.

Saturday,
March 3.

IN this case, notice had been given under 49 Geo. 3. c. 121. § 10. that the defendant meant to dispute the act of bankruptcy.

In an action by the assignees of a bankrupt, the petitioning creditor might a competent witness to support the commission, although he may be called on the other side to prove it invalid.

To prove this, a witness was called, who appeared to be the petitioning creditor himself.

Garrow for the defendant objected to his competency.

Topping, contra, contended that the petitioning creditor was not disqualified to give evidence in support of the commission, as it is not necessarily the interest of a creditor that the debtor, though insolvent, should be made a bankrupt (*a*), and as the witness had no more interest in this action than any other creditor.

(a) *Williams v. Stevens*, ante 300.

1810.
 GREEN
 and others
 v.
 JONES.

Lord ELLENBOROUGH.—I am of opinion that the witness is incompetent. I remember a case in which I was myself counsel, and in which the petitioning creditor was called to upset the commission. I objected to his competency, on the score that he had a strong interest to support it; that he was to be considered in some sense as a party to the cause, and that to examine him on the other side was holding out a lure to his conscience. However, the Judge at Nisi Prius held that he was a competent witness; and Lord Chancellor THURLOW, by whom the issue had been directed, afterwards declared himself of the same opinion. But I conceive that the petitioning creditor is not a competent witness to shew that the commission was regularly sued out. He enters into a bond to the Lord Chancellor, conditioned to establish the several facts upon which the validity of the commission depends, and to cause it to be effectually executed (a). He has, therefore, a clear and direct interest in the question at issue.

Plaintiff nonsuited (b)..

Topping, Yates, and Littledale for the plaintiff,

Garrow and Marryat for the defendant.

[Attorneys, *Ellis* and *Lownet*.]

(a) 2 Cooke's B.C.L. 34
 (b) Vide 49 G. 3, c. 121. § 14.

MERLE and others, v. JOHN WELLS.

Saturday,
March 8,

THIS was an action of assumpsit on the guarantee contained in the following letter from the defendant to the plaintiffs, dated 9th June 1807 :

" Gentlemen,

" I have been applied to by my brother William Wells, jeweller, to be bound to you for any debts he may contract, not to exceed one hundred pounds (with you) for goods necessary in his business as a jeweller. I have wrote to say by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweller not exceeding one hundred pounds after this date.

(Signed) "John Wells."

Where by a written guarantee, A. becomes bound to B. for any debt C. may contract with him, not exceeding 100*l.* the guarantee is not extinguished by one dealing between B. and C. to that amount; but extends to any debt of 100*l.* which C. may afterwards owe to B.

The plaintiffs continued to supply *William Wells* with goods in his business above a twelvemonth afterwards to a considerable amount, during which time they several times balanced accounts with him, and he paid them above the sum of 100*l.* The question was, whether the defendant's guarantee was limited to the first hundred pounds for which the plaintiffs gave credit to *William Wells*, or extended to any sum of that amount which he should thereafter owe them for goods supplied to him in the business of a jeweller.

Garrow contended for the former interpretation. The parties evidently contemplated one dealing to the

1809.

Mason
and others
v.
JOHN WELLS,

amount of 100*l.* If not, when was the defendant's responsibility to cease. He could not mean to bind himself and his executors during his brother's life. The debt had been satisfied for which the defendant became bound, and the guarantee was extinguished before the goods were delivered for which this action was brought.

Lord ELLENBOROUGH. I think the defendant was answerable for any debt not exceeding 100*l.* which *William Wells* might from time to time contract with the plaintiff's in the way of his business. The guarantee is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretship is created to the specified amount. There must therefore be a —— “

Verdict for the plaintiffs for 100*l.*

Park and Marryat for the plaintiffs.

Garrow and Comyn for the defendant.

[*Attorneys, Lamb and Edmonds.*]

Vide Mason v. Pritchard, post.

BUTLER v. HEANE.

Saturday,
March 3.

THIS was an action against a common carrier for the loss of a trunk delivered to him for the purpose of being carried from *Cheltenham* to *London*.

Defence, that the trunk was above the value of 5*l.*, and had not been entered or paid for as such, according to a notice for this purpose.

It appeared that the defendant is owner of a waggon which travels from *Bristol* to *London*, through *Cheltenham*. At the waggon offices in *London* and *Gloucester*, there is a board with large letters painted upon it, giving the usual notice. But at *Cheltenham* the only mode taken to publish this notice was by nailing upon the office door a hand-bill, stating in large print the name of the waggon belonging to the waggon, and in a very small character at the bottom, that the owner would not be answerable for goods above the value of 5*l.* unless entered as such, and paid for accordingly.

It is not sufficient to limit the common law responsibility of a carrier, for him to paste upon the door of his office where goods are received and delivered, a bill bearing the advantages of his carriage, and the like small entries at the bottom of it, that he will not be answerable for goods above the value of 5*l.* unless entered and paid for accordingly.

Lord ELLENBOROUGH.—This is not enough to limit the defendant's common law liability. We have not sufficient evidence of any special contract. The jury ought to believe that at the time when the trunk was delivered at the waggon office at *Cheltenham*, the plaintiff or his agent there saw, or had ample means of seeing, the terms on which the defendant carries

1810.
 BULLER,
 v.
 MEANE.

on his business. How can this be inferred from the hand bill nailed on the door, which called the attention to every thing that was attractive, and concealed what was calculated to repel customers? If a common carrier is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it.

Verdict for the plaintiff.

Garrow and Marryat for the plaintiff.

Park for the defendant.

{*Attorneys, Sudlow and Orr.*}

Vide Cobden v. Bolton, ante, 108.

Tuesday,
 March 6.

FORTUNE v. LINGHAM.

If goods are delivered generally of the sort ordered, the price cannot be recovered back in an action for money had and received as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use.

A Ssumpsit on a warranty, that goods sold were equal to sample, with a count for money had and received.

The goods consisted of stock fish; and several witnesses swore that they were worm-eaten, putrid, and wholly unfit for human use; but no sufficient evidence could be adduced of the warranty.

Park

Park for the plaintiff contended, that he might recover back the price, as money had and received, the consideration having entirely failed.

1810.
 FORTUNE
 v.
 LINGHAM.

Lord ELLENBOROUGH.—If, instead of stock fish, the defendant had delivered to the plaintiff a quantity of saw-dust, the price might be recovered back in the manner proposed. But stock fish were delivered, though seemingly in very bad condition; and you cannot be permitted to try whether they were of a good or bad quality, whether they were fit or unfit for use, in an action for money had and received. For this purpose a special count was indispensable.

Plaintiff nonsuited.

Park and *Puller* for the plaintiff.

Garrow for the defendant.

{*Attorneys, Winter and Dunn.*}

Jude Power v. Wells, Cwp. 818. *Weston v. Downs*, Doug. 23. *Towers v. Barrett*, 1 T. R. 133.

WILLIAMSON and another *v.* BENNETT and MITCHELL.

Tuesday,
March 5.

DECLARATION against the defendants as makers of a promissory note for 200*l.*

An instrument acknowledging the receipt of drafts for the payment of promissory notes.

money and promising to repay the money, is a special agreement and not a
The

1810.

WILLIAMSON
and another
v.

BENNETT
and
MITCHELL.

The instrument produced was in following form, with a promissory note stamp;

" Borrowed and received of J. and J. Williamson
" (the plaintiffs) the sum of 200/- in three drafts by
" W. and B. Williamson, dated as under, payable to
" us W. Bennett and S. Mitchell on J. and J. Wil-
" liamson, which we promise to pay unto the said J.
" and J. Williamson with interest. As witness the
" 26th day of August 1802

" August 26th, 1 draft at 2 months £120	
-----	1 do. 30
-----	1 do. 50

£200	
W. Bennett,	
S. Mitchell."	

Garrow objected that this was an agreement, not a promissory note, and that it could not be received in evidence without an agreement stamp.

Park, contra, insisted that it was merely a promissory note, expressing the consideration for which it was given, viz. money advanced by the plaintiff. The first part of it concerning the drafts, amounts to no more than the common expression, "*value received*," which usually comes at the end of a promissory note. This is a promissory note either payable on demand from the date of it, or after the drafts on the plaintiffs were due, and the declaration contains counts in both ways.

Lord

Lord ELLENBOROUGH.—I think that this is a special agreement, and not a promissory note. There can be no doubt that the money was not payable immediately, and that it was not to be paid at all, unless the drafts were honoured. The transaction on the face of the instrument is evidently this: the plaintiffs were to advance money to the defendants, for which this was to be a security, binding on the defendants after the money had been received. The defendants do not absolutely promise to pay 200*l.*, but the 200*l.* they were about to borrow. All the ambiguity would be removed by reading “which we promise to *pay*,” “which we promise to *re-pay*.” I cannot admit the instrument as a promissory note.

Plaintiff nonsuited.

Park, Marryat, and Barrow for the plaintiffs.

Garrow and Littledale for the defendants.

[*Attorneys, Keersley and Battye.*]

Fide Leeds v. Lancashire, ante 205.

De METTON

1810.

WILLIAMSON
and another
v.
BENNETT
and
MITCHELL.

Friday,
March 9.

A Frenchman
domiciled at
Lisbon consigns
a cargo which is
his property to
Nantes, under the
name of a
native Portugu-
uese, who acts
as "neutralizer."
The ship being
taken and
brought into an
English port, the
cargo is labelled
in the court of
Admiralty: "The
Portuguese, with
the privity of the
Frenchman,"
claims it, and it
is decreed to be
delivered up to
him as neutral
property.—
Held, that an
action at law
could not after-
wards be main-
tained by the
Frenchman
against the Por-
tuguese to recov-
er the proceeds
of the cargo.

DE MELTON and another v. DE MELLON.

ONEY had paid received.

De Melton was born in France, and the other plaintiff in *Switzerland*. They had carried on trade for some time in partnership at *Lisbon*, and were domiciled there. During the present war they consigned a cargo by a Portuguese ship called the *Felicidad* from *Lisbon* to *Nantes*. This was their property; but the papers respecting it were made out in the name of *De Mellon*, the defendant, a native Portuguese subject, who acted upon the occasion as "Neutralizer."—The *Felicidad* was captured by an English cruiser, and her cargo labelled in the High Court of Admiralty. A claim was then put in by the agent of *De Mellon* with the privity of the plaintiffs, and the cargo was ordered to be restored to him as Portuguese property. It was for the proceeds of this cargo which the defendant had acknowledged he had received, that the present action was brought.

The Attorney-General contended, that the plaintiffs had a clear right to recover, as the money was undoubtedly theirs, and there was nothing illegal in the transaction to prevent them from asserting their rights in an English Court of justice. The voyage from *Lisbon* to *Nantes* was sanctioned by the law of nations. The plaintiffs, being domiciled in Portugal, had

a right to trade to any port of France. The adventure might have been carried on in their own names, and could not be vitiated by the substitution of the name of a native Portuguese subject. The object of that most probably was, to lull suspicion and to prevent capture; but the plaintiffs had only to guard against groundless suspicion and unjust capture. If these facts had been established in the Admiralty Court, there could be no doubt that a restitution would have been ordered to the plaintiffs directly. *De Mellon*, however, was only their agent, and was liable for the amount of the cargo as money had and received to their use.

Lord ELLENBOROUGH.—What would have been done in the Court of Admiralty on proof of these facts it is not for me to determine; but those who have procured an adjudication in that court to another person, shall not be permitted here to claim the same property as belonging to themselves. *De Mellon*, a native Portuguese merchant, being set up as the real owner of the cargo of the *Felicidad*, the Court of Admiralty was imposed upon, and might be prevented from thoroughly investigating the circumstances of the case. Perhaps upon farther inquiry the property might have turned out to belong neither to the con signor nor the “*neutralizer*,” but to the consignee at Nantes. At all events, parties cannot have the assistance of our courts in carrying on this system of deception, and the plaintiffs cannot maintain an action at law for that which they have solemnly declared to be the property of the defendant.

The

1810.
 De MELLON
 and another
 v.
 De MELLON.

1810.
De MELLON
and another

The plaintiffs were nonsuited, and the Court of K. B. next term refused a rule to shew cause why the nonsuit should not be set aside.

v.
De MELLON,

The *Attorney General, Garrow, and Bosanquet* for the plaintiffs.

Park and Topping for the defendant.

[*Attorneys, Pearce, and Laze & Lee v. b. l.*

Triday,
Mutany.

MILCALLI and others v. BRAUN

A bond of n^o 1000^{l.} on
to the trust of
the public monies
paid by me,
and upon
condition that
the said T. H.
Wilkinson do
serve the said
company, although
as far as
or as near the
company is
composed.

DEBT on bond, dated 18th June 1803, in the penal sum of 2,000*l.* with the following condition:

"Whereas T. H. Wilkinson is chosen and admitted into the service of the Globe Insurance Company, the condition of this obligation is such, that if the said T. H. Wilkinson do and shall, from time to time, and at all times hereafter, do, or continue in the said service of the said company, faithfully, honestly, diligently, and carefully execute, perform, and discharge the said service, and all and every other services of the said company, whether he is, shall, or may be employed, or whereunto he is, shall, or may be called, and shall, so soon as he shall be thereto required, give and deliver in writing a just and true account of all monies, notes, bills, &c. which in the said service shall

" shall come to the hands of the said T. H. Wilkinson, or which he shall be entrusted with by or on account of the said company, and also make good, answer for, and pay the monies due on the balance of such account to the said company or such persons as the said company, or the court of directors thereof for the time being, shall appoint, and shall and do moreover, well and sufficiently save harmless and keep indemnified the said company, and the directors and all other members thereof, from and against all losses, &c, for or by reason of any matter, &c, done or omitted to be done by the said T. H. Wilkinson in or during his said service; then this obligation to be void, &c."

The defendant after craving oyer pleaded; 1st, Non est factum; 2dly, Performance.

The replication to the 2d plea assigned various breaches of the condition by *Wilkinson* from the 1st of January 1804 to the commencement of the suit;—which were denied by the rejoinder.

It appears, that the plaintiff's were five of the trustees of *The Globe Insurance Company*; that this company is unincorporated, but that four years after the date of the bond the members obtained two acts of parliament to enable them to sue and be sued in the name of their treasurer; that there has been a continual fluctuation in the members of the company; that in the years 1803, 4, and 5, many old members went out

1810.

MICHAEL
and others
v.
BALIN.

1810.

MELVILLE
and others

v.

BRUIN.

and new ones came in; and that there were generally upwards of a hundred changes in the course of a year.

The *Attorney-General* for the defendant contended that as soon as there was any change among the members of the company, the bond was at an end. The *Globe Insurance Company*, not being a corporation, is like any other partnership or mercantile firm, and there is no point of law better established than that a bond conditioned for the good conduct of a clerk to any partnership, ceases to operate the moment an old member goes out of the partnership, or a new one comes in. The notion that the security is given to the *house* and not to the individuals composing it, has been long exploded. The defendant might have great confidence in the prudence and diligence of some of the members of the *Globe Insurance Company* who retired, and he might have such an opinion of the negligence and folly of some who bought in, that he would by no means have become bound for a clerk under their superintendance. But none of the breaches were proved. By the words "*said Company*" in the condition, must be understood, the Company in existence at the execution of the bond; and that Company had ceased to exist, and another partnership was formed, before any of the money had been received by *Wilkinson* which he had not brought to account.

Lord ELLINBOROUGH.—Where a bond of indemnity is given for the conduct of a clerk in a banking house,

house, or any common partnership, the law is clearly as it has been laid down, and the instant there is a change in the firm, the indemnity is at an end. But *The Globe Insurance Company* is necessarily a flux body; and its constitution must have been contemplated when the bond was given. Thus, like other contracts must be construed according to the intention of the contracting parties. I think the obligor must be taken to have meant *The Globe Insurance Company for the time being*, and I am therefore of opinion that his responsibility is not affected by a change among the members of which it is composed.

The plaintiff had a verdict, and the ensuing term the Court of K. B. discharged a rule which they had granted to shew cause why there should not be a new trial.

Garrow and Tandy for the plaintiffs.

The Attorney-General, Park, Wrigley and Conyngham for the defendant.

{Attorneie, Kage and Noy.]

<i>Vide</i> Arlington v. Mericke,	291 n.	<i>Mycis v. Edge</i> , 7 T. R.
2 Saund. 112.	251.	<i>Strange v. Lee</i> , 3 East
2 Black. Rep. 931. 3 Wils. 532.	184.	<i>Dance v. Girdler</i> , 1 New
S. C. Barker v. Parker, 1 T. R.	Rep. 31.	
287.		
<i>Barclay v. Lucas</i> ,	<i>Ib</i>	

1810.
METCALF
and others
v.
BRUIN.

Dr. BRUNAULT v. FULLER and others.

Thursday,
May 4.

In an action for
money, had and
received to rec-
over a sum paid
by a third person
into the defendant's
hands for the plaintiff's
use, the plaintiff
is not entitled to
interest.—
The rule up to
this subject in
*De Haan et al. v.
Bowerbank,*
1 Canb. 3d,
confirmed by
the Court of
C. B.

THIS was an action for money had and received to recover the sum of 39*l.*, 16*s.*, 9*d.*, and interest thereupon under the following circumstances:

The plaintiff was holder of a bill of exchange, for that amount, accepted payable at the banking house of the defendants. The bill became due the 23rd of September last, and on that day the clerk of the acceptors paid in money at the defendants' banking house for the purpose of taking it up. The acceptors happened at this time to be indebted to the defendants; and the latter, instead of paying the money to the plaintiff as holder of the bill, insisted that they had a right to apply it in satisfaction of the balance due to themselves from the acceptors.

It being settled that this was money had and received by the defendants to the use of the plaintiff as holder of the bill,—*

The *Attorney General* insisted that he was entitled to interest upon the 39*l.*, 16*s.*, 9*d.*, from the 23rd of September to the time of signing the final judgment, — which amounted to 28*l.*, 13*s.* This was a liquidated demand; payment had been requested; the defendants had no doubt made interest of the money; the plaintiff

plaintiff certainly would have turned it to advantage, had it been duly paid to him; therefore, according to the rules of justice and of law, the plaintiff was entitled to a compensation, in the shape of interest, for the injury he had suffered by the money being withheld from him.—But

Lord Ellenborough decided, that as there was no contract, either express or implied, to pay interest in this case, interest could not be awarded. His Lordship again laid down the rule as it is stated in *De Haer and v. Bowesbank*, 1 Campb. 50.; and having no doubt upon the point, refused to save it; but requested the *Attorney General*, if he thought the direction erroneous, to bring the matter before the court.

Accordingly the plaintiff had a verdict only for the principal money; and when the term came, the *Attorney General* submitted to the Court of K. B. that the sum being liquidated, he was entitled to interest after a demand of payment.—But

The Judges all agreed that interest ought not to have been given.—Sir B. T. and J. mentioned with disapprobation the circumstance of Mr. Justice *Buller* having allowed interest on policies of insurance, and said, that the debt being liquidated, was not now the rule by which interest was recoverable.

Nothing was taken by the motion.

1810.
DE BERNARDES
v.
T. G. R.
and others.

1810.

DE BERNALLES

FULLER
and others.

The Attorney General and Wigley for the plaintiff.
Garrow for the defendants.

Q. Whether interest would be allowed in an action for not giving a bill of exchange in payment of goods sold, from the time when the bill, if given, would have become due?—Interest has very recently been given in such a case by the *Court of Exchequer Chamber*, where the practice seems now to be to allow interest only if interest was recoverable below.

Bucher and another v. Jones (in error) — Exchequer Chamber, Saturday, 26th May 1810. The declaration stated, that the plaintiff sold and delivered to the defendants twenty bales of cotton, for the price of 7092. 17s. 6d. to be paid for at the expiration of four months from such sale and delivery, by giving a bill of exchange to the plaintiff, payable two months after the giving thereof; but that the defendant had not given a bill, or paid for the goods. There were other special counts in the declaration, and counts for goods sold and delivered. After judgment by default, and a writ of enquiry executed, a writ of error was brought, on which there was judgment for the defendant in error this term.

Littledale now moved, that it might be referred to the Clerk of the Errors, to calculate the amount of the interest upon the final judgment obtained in this cause, from the time of the service of the allowance of the writ of error until the affirmance of the said judgment in this court, and that such interest might be added to the damages for which such final judgment was entered up.

Campbell, contra, allowed, that by 3 Hen. 7. c. 10. and 19 Hen. 7. c. 20. the court had authority to give interest by way of damage, on the affirmance of a judgment in every case; but submitted that the practice of the *Exchequer Chamber* now was to give interest only in cases where a debt was recovered which carried interest of itself. Though they once had allowed interest in an action of *tort*, (*Lord Lonsdale, v. Littledale*, 2 H. Bl. 267.) and in an action on an attorney's bill, (*Shepherd v. Macbeth*, 2 H. Bl. 284.) these decisions had been disapproved of; and, subsequently, interest had been refused in an action on an attorney's bill (*Warren v. Bailey*, 2 Bos. & P. 1,

Pel. 219.) where the court said, that similar applications had been frequently made and rejected; and in a still later case, (*Bristow v. Waddington*, 2 New Rep. 353.) it was laid down, that interest should not be allowed upon affirmation of a judgment in an action for not performing a contract. In such an action as the present, interest could not be allowed by the jury. The notion that a liquidated demand carries interest has been some time exploded, and interest can only be given on debts payable on a certain day, as promissory notes and bills of exchange, or where there is a contract either express, or implied to pay interest. This is no more than the common case of goods sold and delivered.

Sir J. MANSFIELD, C. J.— You allow that if you had given the bill in part performance of your agreement, you must have paid interest pending the writ of error. Then, are you to be placed in a better situation by refusing to give the bill, and performing no part of the contract? This would be most unjust. I am of opinion that interest ought to be allowed in the same manner as if the action had been brought on a bill accepted in payment of the goods.

THOMPSON, B.—According to the rule you contend for, we

ought to allow interest upon the affiance of the judgment; as this, I conceive, is a debt which carries interest of itself, and interest from the time the bill would have become due, ought to have been given on the execution of the writ of inquiry.

The other judges assenting,

Rule granted.

Since the last case was sent to the press, the court of K. B. has determined, that interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day.

Gordon and others v. Swan and others, K. B. 30 May 1810.

TADDY moved for a rule to shew cause why the inquiry executed in this case, should not be set aside, on account of a misdirection of the under-sheriff. The action was for goods sold by the following contract:

“London, 9 Sept. 1808
“Sold for account Messrs
“Gordon & Murphy—
“To Swan, Anderson, & Co.
“About 150 tons Spanish
“copper, at 64*l.* per ton, to be
“received in 14 days; payable
“at six months.”

The principal had been paid after the commencement of the action; and the question was, Whether interest ought to be allowed from the expiration of the six months for which the credit was given? The under-

1810.

D. L. BIRNALES

v.

FULTER
and others.

1810

De BERNALDE
TUTTER
and others.

should recite the jury, that they could not give interest, particularly as the plaintiff had not demanded specially.—*Taddy* now contended that interest ought to have been allowed, as the money was payable on a certain day. He relied on *De Haerland v. Boerbank*, 1 C. P. b. 1, where Lord Trentham is represented to have said that interest should be allowed “where there is a contract for the payment of money on a certain day, as on bills of exchange, promises, &c.,” and *Murphy v. Hu*, 2 Bos. & P. d. 337, in which the court of C. P. expressly decided, that in a contract for the sale of goods, if any particular time be limited for payment of the price, the vendor is entitled to interest on the price from that time—but

Lord Trentham does not say, if interest is allowed in this case, it must be allowed in almost every action for goods sold, as it generally happens, that either by the usage of trade or by express stipulation between the parties, or it is given for a specific time; and that what he said in *De Haerland v. Boerbank* must be taken to refer to written instruments,

such as promissory notes and bills of exchange which are there put as examples. There must be some fixed rule upon the subject, although occasional hardship may be produced, as it is impossible to enter into the equitable circumstances of each particular case.—His lordship expressed a wish that a bill of exceptions should be tendered, if the rule by which he had always acted was considered contrary to law, and if it could not be denied to be law, that those who disapproved of it should apply to the legislature

Le Blanc, J.—If interest were allowed here, interest must be given in every case for goods sold, least from the commencement of the action till the time of judgment, final judgment

Buxley J.—The six months credit is for the benefit of the purchaser, and means, that he shall not be arrested or sued till the expiration of that time; and in *Murphy v. Hu* the court of C. P. did not decide that interest ought to have been given, but merely refused to set aside the verdict because interest was included in the damages.

Rule refused.

MACKENZIE v. SHEDDEN.

Friday,
May 4.

THIS was an action on a policy of insurance on the freight of the American ship *Lexington*.

The policy was dated 29th July 1808, and was filled up as follows, the italicks denoting the words which were in writing: "at and from *Sheerness in ballast to Charente and back to a port in the British Channel and London*, upon the said ship and freight at and from the date hereof, and so shall continue and endure during her abode there, &c., and further until the said ship with all her ordnance, &c., shall be arrived at *Charente and back at a port in the Channel and London*. At and after the rate of ten guineas per centum on freight valued at the sum insured to be deemed interest on the outward voyage, although in ballast, to pay outfit, seamen's wages, and provisions &c. for the voyage."

The declaration, after stating the defendant's subscription to the policy, set out a charter-party, dated 11th July 1808 between the captain of the *Lexington* and one *Christopher Idle*, for a voyage from *Sheerness to Charente in ballast, and back to London with a cargo of brandy*; whereby the charterer covenanted to send alongside the ship at *Charente* a full cargo of brandy, and to pay freight for the same at the rate of

while the ship lay at *Charente* before any goods were put on board, and that the same liable for a loss happening

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MACKENZIE
v.
SHEDDEN,

7L. 10s. per ton. The declaration afterwards alleged that the ship arrived at *Charente* on the 29th of August following; that from her arrival till the 17th of January 1809, she was detained and prevented from departing; that she was then seized and taken possession of by the persons exercising the powers of government there, and that by reason of this detention and seizure, the brandy in the charter-party mention was not set along side the ship, and the captain was prevented from earning and obtaining the said freight, and the same was thereby wholly lost to the owner of the ship, being the person interested therein.

It appeared that from the arrival of the *Lexington* at *Charente* there actually was an embargo on all American ships, and that she was eventually seized and condemned for having come from an English port.

Park for the assured contended, that this case came directly within *Thompson v. Taylor*, 6 T. R. 472, in which it was laid down, that though the commencement of the risk on *freight* is generally from the taking of the goods on board, yet that where the ship is to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing for that place. Therefore, a ship having sailed from London to Teneriffe to take in a cargo for the West Indies, and having been lost before she arrived at the port of loading, the insurers on freight were held liable.

The *Attorney-General, contra*, allowed that had the loss in this case happened on the outward voyage, the action

action could not have been defended ; but he insisted that the underwriters were not liable *during the stay of the vessel at Charente*, until the goods were begun to be loaded. Although there might be an exception to the general rule upon the subject, that could only arise from a special contract, the words of which must receive a strict interpretation. The insurance here was declared to be “on freight, to be deemed interest on the outward voyage, although in ballast,” without any mention of the ship’s stay at the loading port, which was therefore left as in ordinary cases. From the ship’s arrival, till she began to load, the policy was suspended. The underwriters never undertook that the French government would sanction the intercourse between *Charente* and *London*, and would have acted very foolishly if they had. Were they to continue answerable if the embargo had lasted several years ?— But there was another objection equally fatal, that the ship had actually lain six months at *Charente* without a single cask of brandy being put on board. Supposing the underwriters liable during the whole of her stay there, that liability could not be indefinitely protracted. The embargo prevented the ship sailing, but did not prevent her from taking in her cargo. Therefore the charterer, or his agents, were bound to load her without delay according to the charterparty, so that she might be ready to sail the moment the embargo was removed. This event might have happened at any moment before the seizure; and was the risk of the underwriters to be unnecessarily continued from thence till the loading should be completed?

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MACKENZIE
v.
SHEDDEN.

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Lord ELLENBOROUGH.—It would be measuring out the law with great severity to hold, that they were bound to load the ship during the embargo, when it was so doubtful whether she would ever be allowed to sail, and the probability was that she would ultimately be seized with all the goods found on board. I think the underwriters have no defence upon this ground.—Looking merely to the words at the bottom of the policy alluded to by the defendant's counsel, I should have thought it very doubtful whether the freight was meant to be insured from the arrival of the ship at *Charente*, to the beginning to take goods on board. Although I have never hitherto met with a policy by which the responsibility of the underwriters was suspended and the risk was divided into two discontinuous halves, such a policy may doubtless be framed. But when I consider all the words inserted in this policy, I am of opinion that it was meant to cover the subject matter insured, without any intermission, during the whole of the adventure. The insurance is stated to be *at and from Sherness to Charente and back to London upon freight from the date thereof*, to continue till the ship should be arrived at *Charente and back at a port in the Channel and London*. There might be great risk of the vessel being prevented from loading, and being seized by the French Government before any goods were put on board; but it seems impossible to say that this was a peril for which the underwriters did not render themselves responsible. The last clause in the policy must be referred to the former, and the great object of the whole will then appear

appear to have been, to preserve the integrity of the risk. From the moment the outward voyage commenced, till the ship's return with the brandy, the underwriters have undertaken to indemnify the ship owner for any thing that should prevent the ship from earning her freight on the voyage insured. I therefore think they are liable for a loss happening in the manner alleged and proved. But as there is some novelty in the point, I will give you leave to move to enter a nonsuit, if upon consideration you think you can with any prospect of success.

The plaintiff had a verdict, which was acquiesced in.

Park and Parnther for the plaintiff.

The *Attorney-General, Garrow, and Marryat* for the defendant.

Vule Hornastle v. Stuart, 7 East, 400. *Forbes v. Cowie*,
1 Campb. 520. *Knox v. Wood*; *Ib.*, 543.

1810.

MACKENZIE
SHEDDEN.

OXFORD CIRCUIT.

LENT ASSIGES, 50 GEORGE III.

WORCESTER.

Coram WOOD, B.

1810.

MASON v. S. PRITCHARD.

A guarantee for
the payment of
any goods to be
supplied to a
third person to
a specified
amount, remains
in force after
goods to this
amount have
been supplied
and regularly
paid for, until
the surety gives
notice that he
will be no longer
responsible.

THIS was an action of assumpsit upon a guarantee
in the following form:

“ I hereby promise to be responsible to *Thomas Mason* of the city of *Worcester*, tea dealer, for any goods he hath or may supply my brother *William Pritchard* of *Hay*, in the county of *Brecon*, to the amount of 100*l.*. As witness my hand, 27th October 1807.

“ Stephen Pritchard.”

It appeared that the plaintiff, after this guarantee, had furnished goods to *William Pritchard* above the value of a 100*l.*, for which he had been regularly paid; and that, continuing to deal with him, he supplied

plied him with the goods for which the present action was brought.

1810.
MASON
v.
PRITCHARD.

Abbott contended, that the defendant's responsibility was at an end when the plaintiff had been paid for goods to the amount supplied to William Pritchard, after the guarantie, and that the defendant could not be supposed to have guaranteed his brother's solvency to an indefinite period and after he had become notoriously insolvent.

Wood, B.—After goods to the amount of 100*l.* had been supplied and paid for, perhaps the defendant might have got rid of his liability for any goods to be subsequently furnished to his brother, by giving the defendant notice that he would be no longer responsible. But until such notice was given, I am clearly of opinion that the guarantie remained in force.

Verdict for the plaintiff.

In the ensuing term *Abbott* moved to enter a nonsuit; but the Court of K. B. thought that the instrument declared upon was a continuing guarantie, and refused a rule to shew cause.

Dauncey and *Wigley* for the plaintiff.

Abbott for the defendant.

Vide *Oakey v. Young*, 2 H. Bl. 613. *Merle v. Wells*, *ante* 413.

STAFFORD.

STAFFORD

Coram LAWRENCE, J.

Friday,
March 30.

M'ALLESTER v. HADEN.

An action lies
on a wager on a
horse-race, if
neither of the
sums betted by
the parties
amounts to 10*l.*
and the race
itself is run for
the sum of 50*l.*
or upwards.

ACTION upon a wager on a horse-race.

It appeared that the plaintiff betted the defendant four guineas to six, that *Bob Booty* should win the King's plate, of the value of 100 guineas, at the Lichfield races in 1808; and that *Bob Booty* won accordingly.

LAWRENCE, J. was of opinion that the bet being under the sum of 10*l.*, and therefore not contrary to 9 Ann. c. 14., and the race being for upwards of 50*l.* and therefore not contrary to 13 Geo. 2. c. 19. the action well lay, and—

The plaintiff had a verdict.

Dauncey and *Campbell* for the plaintiff.

Jervis for the defendant.

Although this point has not
been expressly ruled before,

Lord KENYON, in *Good v. Elliott*, 3 T. R. 705, incidentally
declared

declared himself of opinion that such a wager is valid; and in *Bulling v. Frost*, 1 Esp. Cas. 236, his lordship held that an action might be maintained to recover the sum of £1. 10s. lost by the defendant to the plaintiff at the game of *old Fours*. But if the sum betted on a horse-race by either of the parties be above 10l. an action will not lie on the wager. *Goodbeare v. Mealey*, 2 Stra. 1159. *Blyton v. Pye*, 2 Wils. 309. *Clayton v.*

Jennings, 2 Bl. Rep. 706. So although the sums betted be under 10l. if the horse-race is run for a sum less than 50l. the law is the same. *Johnson v. Banu*, 1 T. R. 1. And even where the sum run for is above 50l. a wager on the race is illegal, unless it be a bona fide contest between two or more horses running on the turf. *Ximenes v. Jaques*, 6 T. R. 499. *Whalley v. Pajot*, 2 Bos. & Pul. 51.

1810.

M'ALLESTERv.HADEN.

{It may be useful to insert the following note here, though out of the order of time, for the purpose of correcting a general misconception upon a point of frequent recurrence.]

SITTINGS IN EASTER TERM AT GUILDFHALL.

PRIEL *v.* VANDATENBERG.

ACTION for money lent.

The plaintiff's case was, that he had accepted and paid several bills of exchange for the defendant's accommodation.—The bills were produced by the plaintiff, and proved to have been drawn by the defendant. They were likewise received in the usual form of bills paid; but it did not appear by whom the receipts were written.

Richardson contended, that the simple production of the bills by the acceptor was *prima facie* evidence of payment. They could not have got into his hands unless he had paid them; and the presumption that an instrument in the possession of the person liable

bill, unless this receipt is shown to be in the hand-writing of a person entitled to upon

Wednesday,
May 17.

The production of a bill of exchange from the custody of the acceptor, is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted.—

Nor is payment to be presumed from a receipt indorsed on the demand payment

1810.

PEFILL
v.
VANBATEN-
BERG.

upon it, is satisfied, has been invariably acted upon. But the receipts indorsed on these bills put the matter beyond all doubt, as the defendant was guilty of forgery, if the bills had not been paid; and the law would not presume that a man had committed a capital offence.

Lord ELLENBOROUGH.—Shew that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor or his assignee by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or a co-acceptor, with his name upon them as acceptor? — very possibly that when they were left for acceptance, he refused to deliver them back, and having detained them ever since, now produces them as evidence of a loan of money.— Nor do I think that accepts carry the matter a bit farther, unless you shew them to be in the hand-writing of the defendant, or some other person authorized to receive payment of the bills. A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; and it is possible that though the bills are unsatisfied, these receipts may have been fraudulently indorsed without the plaintiff's privity. The fact of payment still hangs *in dubio*, and you must do something more to turn the balance. Prove the bills out of the plaintiff's possession accepted, and I will presume that they got back again by payment. If you do not, the plaintiff must be called.

However, a witness afterwards swore that the defendant had acknowledged the debt, and the plaintiff had a verdict.

Richardson for the plaintiff.

Garrore for the defendant.

In an action by the drawer against the acceptor of a bill of exchange, if the plaintiff produces the bill with a general receipt on the back of it, this is *prima facie* evidence that the bill was paid,—not by the plaintiff,—but by the defendant. *Scholey v. Walsby, Peak, Cas. 25.*

Payment of Money may be proved, by the lender producing a cheque drawn by him upon his bankers in favour of the borrower, and indorsed by the latter; but without the indorsement, it is no evidence. *Egg. v. Barnett, 3 Esp. Cas. 196.*

CASES

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B

At the Sittings on and after Easter Term,

50 VOLUME II

FIRST Sittings in TERM at WESTMINSTER.

1810.

LIPSCOMB v. HOLMES, Esq.

Monday
May 14.

THIS was an action for work and labour as a surgeon, and for curing the defendant and several persons of his family, of divers diseases and maladies, under which they had respectively laboured and languished. The defendant pleaded the general issue, and paid 37. 13s. 6d. into court.

If a medical practitioner poses himself off as a physician, although he has no diploma and no right to assume that character, he cannot maintain an action for his fees.

The first defence set up was, that the plaintiff was a physician, and therefore could not maintain an action for his fees. It appeared that he wrote prescriptions, was called, "Doctor," and signed himself M. D:

1810.
 —————
 LIPSCOMBE
 v.
 HOLMES.

Park said he should shew, that at the time when the visits were paid, for which the action was brought, the plaintiff was only a surgeon; and that he had not taken out his diploma as a physician till long after.

LORD ELLENBOROUGH.—If a person passes himself off as a physician, he must take the character *cum onore*. When he brings an action for visits paid by him as a physician, I will give him credit for being so, and tell him he must trust to the honour of his patients. Whether the plaintiff had or had not a diploma when he attended the defendant, is immaterial. Whatever he was, if he at that time wrote prescriptions and added M. D. to his name, he must be nonsuited.

Park then produced the rule for paying money into court, which his lordship thought removed the objection, and admitted the plaintiff's right to sue as a surgeon.

It was afterwards agreed to withdraw a juror.

Park and *Espinasse* for the plaintiff.

Gaynor and *Agar* for the defendant.

[Attorneys, *Peach* and *Railton*.]

Vide Chorley v. Balcot, 4 T.R. 317, in which it was first decided that a regular physician cannot maintain an action for his fees, by a barrister. *Moor v. Row*, Cha. Rep. 38.—Nor is a barrister

ter liable for gross ignorance or negligence. *Fell v. Brown, Peak.* 96. Nor to refund a fee given him to argue a cause, which he does not attend. *Turner v. Phi-*

lips, ibid. 122. But a surgeon is liable for ignorance, as well as for negligence. *Slater v. Baker,* 2 Wils 359. *Seare v. Prentice,* 8 East, 348. Bull. N. P. 73.

1810.

LIPSCOMBE.
v.
HOLMES.

LUCAS v. WINTON.

Monday,
May 14.

THIE plaintiff declared as indorsee, against the defendant as maker, of a promissory note for 53*l.* 18*s.* dated 22d February 1809.

In addition to the general issue, the defendant pleaded, in discharge of his person, that having been confined in the King's Bench prison on the 1st of February 1809; he was afterwards discharged under the insolvent debtor's act, 49 Geo. III. c. 115; and that the sums of money mentioned in the declaration were contracted before the said 1st of February, mentioned in the said Act.

It appeared that the note was originally given by the defendant to one *Boon*, as a security for a debt due before 1st February 1809; but that it was indorsed to the plaintiff for a valuable consideration after that day.

Reader for the defendant contended that the issue on *the insolvent debtor's act*, must be found for him, as the note must have reference back to the consi-

After the 1st day of February 1809, a promissory note was given for an antecedent debt. Held, that as against the plaintiff, the maker would have been discharging his under the insolvent debtor's act, 49 Geo. III. c. 115; but that he was not, as against a person to whom the note was subsequently indorsed.

1810.

*Lacy v.
WINTON.*

deration for which it was given ; and the debt for which the action was really brought clearly came within the description of those from which the legislature intended that the person of the debtor should be discharged.

Lord ELLENBOROUGH.—Had the action been brought by the payee, I should have been strongly inclined to think, that the issue must have been found for the defendant. As to *Boon*, the debt certainly existed before the 1st of February. But how can I say that he was then indebted to the present plaintiff? — The debt for which the plaintiff now sues, did not exist till after the security was indorsed to him, or at least, not till the 22d of February, when the note was drawn.

The plaintiff had a verdict on both issues.

Garrow and *Littledale* for the plaintiff.

Reader for the defendant.

Vide Macdonald v. Borington, 4 T. R. 825.

THIRD Sittings AT GUILDHALL.

1810.

Monday, May
28.

WOOLSEY v. D. CRAWFORD.

THIS was an action on a bill of exchange, drawn by *I. S. Crawford* at *Quebec*, upon, and accepted by the defendant in England. The declaration stated that the plaintiff, who was payee of the bill, had indorsed it in *Canada*, and that in consequence of its returning to that country dishonoured, he had been compelled to pay to the indorsee 10*l.* per cent. upon the amount as re-exchange, and 6*l.* per cent. interest from the time it became due, together with other charges.

The acceptor of a foreign bill of exchange is not liable for re-exchange not for more than the principal sum, together with interest according to the legal rate of interest where the bill is payable.

Park undertook to prove these facts, and contended that the defendant was answerable for all the damage that had been suffered by the plaintiff, from the bill being dishonoured

Lord ELLENBOROUGH.—You may as well state that by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried farther, than to

G g 3

pay

1810.
Woolsey v.
Crawford.

pay the sum specified in the bill, and interest according to the legal rate of interest where it is due.

Verdict accordingly.

Park and Puillier for the plaintiff.

The cause was undefended.

[Attorneys *Lewis* and *Wharton*.]

Vide Napier v. Shneider, 12 East, 420.

ADJOURNED Sittings at WESTMINSTER.

JACKSON v. HUDSON.

1810.

Thursday, June
7th.

THIS was an action against the defendant as acceptor of a bill of exchange, which was drawn and accepted in the following form:

London, 30th December 1809.

Two months after date, pay to my order 157*l.* for value received,

E. Jackson.

To Mr. I. Irving.

Accepted I. Irving.

• Accepted Jos. Hudson,
 • payable at Mr. Hudson's,
 • 132, Oxford Street.

If a bill of exchange be accepted by the drawee, another person who, for the purpose of guaranteeing his credit, likewise accepts the bill in the usual form, is not liable as acceptor, but must be sued upon his collateral undertaking.

The first count of the declaration stated, that the bill was directed to *Irving*; the second took no notice of there being any drawee; and both averred that the defendant accepted it, "according to the usage and custom of merchants."

Garrow for the plaintiff stated, and undertook to prove, that the plaintiff having dealings with *Irving* concerning the sale of goods, refused to sell him any more, unless the defendant would become his surety; that the defendant agreed to this; that goods to the value of 157*l.* were in consequence sold by the plain-

G g 4 tiff

1810. tiff to *Irving*; that the bill in question was drawn for the price of them, and that the defendant with a knowledge of all these facts, had put his name upon the bill as acceptor. He must therefore be considered as having accepted the bill jointly with *Irving*; and as he had not pleaded in abatement, he was separately liable in the present action.

**JACKSON v.
HUDSON.**

Lord ELLENBOROUGH.—If you had declared, that in consideration of the plaintiff selling the goods to *Irving*, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is *contrary* to the usage and custom of merchants. A bill must be accepted by the drawee, or failing him, by some one for the honour of the drawer. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such.

Plaintiff nonsuited.

Garrow and *Marryat* for the plaintiff.

Park and *Reader* for the defendant.

(Attorneys *Humphries* and *Hannam*.)

But although there can be no acceptor after a general acceptance by the drawee, it is said that when a bill has been accepted *suprà protest* for the honour of one party, it may by another individual be accepted another. Beawes, pl. 42.

Doe

1810.

DOE EX. D. JONES & UX. V. CROUCH.

Thursday, June
7th.

EJECTMENT to recover possession of a house and orchard at *Enfield*, let by the lessors of the plaintiff to the defendant for seven years, from Michaelmas 1809. The indenture of lease contained a covenant on the part of the defendant, to deliver up the premises at the end of the term in good repair, "and all the trees which are now standing in the orchard of the said premises, whole and undefaced, *"reasonable use and wear only excepted."*" And there was a proviso for re-entry on a breach of any of the covenants in the lease.

A covenant in a lease, to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "*reasonable use and wear only excepted,*" is not broken by removing trees decayed and past bearing from a part of the orchard which was too crowded.

It appeared that the defendant had cut down nine trees in different parts of the orchard, but that these were decayed, and past bearing; that an equal number of young thriving trees were planted by the defendant in another part of the ground demised; that the orchard was greatly too crowded with trees; and that from what the defendant had done, the lessors of the plaintiff were likely to get back the premises at the end of the term in better condition, with respect to trees, than at the granting of the lease.

Garrow contended, that by the terms of the covenant, the defendant was prevented from cutting down a tree for any reason whatsoever, and that as he had rendered it impossible for him to deliver up the identical trees demised, the lease was forfeited.

Lord

1810.
 Doe ex. d.
 JONES & UX.
 v.
 CROUCH.

Lord ELLENBOROUGH.—The covenant contains an exception of *reasonable use and wear*. If the trees in an orchard are too crowded, must not the removal of such as are past bearing, be considered the reasonable use of the orchard and the trees? There is no pretence for the ejectment.

Nonsuit.

„ *Garrow and Andrews* for the lessors of the plaintiff.

Park and Richardson for the defendant.

[*Attorneys, Meymot and Wild.*]

1810.

HELMESLEY v. LOADER.

Friday, June 8.

In an action by the indorsee against the acceptor of a bill of exchange, the declaration stated, that the payee indorsed it *his own proper hand being thereunto subscribed*. It appeared that the payee's name upon the back of the bill was written, under his authority, by his wife. *Sent. &c.*, that this is no variance; and

at any rate the defendant is not at liberty to object that the indorsement is not in the hand-writing of the payee himself, after a promise, with a knowledge of this circumstance, to pay the bill.

ACTION by the indorsee against the acceptor of a bill of exchange.

The declaration stated, that the bill was drawn by one *Force*, payable to his own order, and that he indorsed it to the plaintiff, "*his own proper hand being thereunto subscribed.*"

It appeared that *Force's* name on the back of the bill was in the hand-writing of *his wife*; but that the defendant when acquainted with this circumstance, promised the plaintiff to pay the bill.

Lord

Lord ELLENBOROUGH said, he thought it would be too narrow a construction of the words *own hand*, to require that the name should be written by the party himself; and his lordship was inclined to think it would be enough to shew the name written by an authorised agent, but that at any rate the defendant could not be allowed to take the objection, after a promise to pay, made with a knowledge of all the facts.

1810.

HELMST^{EY}

v.

LOADER.

Verdict for the plaintiff.

Park and Puller for the plaintiff.

Espinasse for the defendant.

[Attorneys, Vincent and Davis.]

But if the declaration state that the party indorsed the bill “*his own proper hand being thereunto subscribed,*” and the indorsement was in fact made by an agent *per procuration*, this is a fatal variance. Levy *v.* Wilson, 5 Esp. 180. It seems extremely improper to introduce this averment, as it is quite unnecessary, and may hurt but cannot help. A general allega-

tion that the party made, accepted, or indorsed a bill of exchange *according to the usage and custom of merchants*, is supported by evidence of the act being done—immediately by the party himself,—or by an agent in his name,—or by procuration in the name of the agent. Elliot *v.* Cooper, 2 Lord Raym. 1376. Ereskine *v.* Murray, ib. 1542. Heys *v.* Heseltine, *post*.

Wednesday,
June 13.

A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party : an action of trover is afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages are recovered ; and these, together with the costs, are paid by the bailiff.—Held that there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain *money had and received*, to recover back the levy money paid over.

WILSON v. MILNER.

INDEBITATUS assumpsit for money paid, and money had and received.

On the 20th of February 1809, the defendant sued out a *fit. fa.* into Middlesex, upon a judgment against one *L. George*; —and the warrant to levy 155*l.*, besides poundage, was directed to the plaintiff, a bound bailiff of the sheriff of Middlesex. The plaintiff made his levy, and on the 22d of February paid over the 155*l.* to the defendant. On the 1st of March, a commission of bankrupt was sued out against *George*, and it was found that he had committed an act of bankruptcy on the 19th of February. His assignees immediately brought an action of trover against the Sheriff, and both the parties to the present suit, and recovered 152*l.* 18*s.* 6*d.* damages, together with costs, making up the sum of 216*l.*, the whole of which was paid by the bailiff to the assignees.

It was contended on the one hand, that the plaintiff was entitled to be completely indemnified by the defendant; and on the other that an action could not be maintained by the bailiff, to recover back even the 155*l.* which if it could not be retained by the defendant, was money had and recovered to the use of the Sheriff.

Lord ELLENBOROUGH.—I think the plaintiff cannot recover on the count for money paid. Among joint

joint tort-feasors there is neither contribution, nor implied promise of indemnity (*a*). But the £55*l.*, being paid to the defendant under a mistake respecting George's bankruptcy, I think it may be recovered as money had and received to the use of the plaintiff, who was answerable for it to the defendant.

1810.

WILSON
v.
MUNIER

Verdict of the jury.

Garrison and Mionget for the plaintiff.

Park for the defendant.

{Afternoon, 1st inst. 31 May 1810.}

(*a*) *Merryweather v. Nixon*, 8 *1. R.* 180. *Father brother v. Ausley*, 1 *Camp.* 343.

LLOYD v. ROSEBEY.

Wednesday,
June 13.

THIS was an action on stat. 4 Geo. 2. c. 28. for double the yearly value of certain premises of the plaintiff held over by the defendant after a notice to quit.

Debt for double value on 4. Geo. 2. c. 28, does not lie against a weekly tenant.

It appeared that the defendant was a *weekly tenant*, and that he continued in possession several weeks after the expiration of a notice to quit and demand made.

1810.

LLOYD
v.
ROSSEE.

Lord ELLENBOROUGH.—I am strongly inclined to think that this case does not come within the statute, which speaks of “tenants for life, lives or years.” I am aware that a tenant for half a year, or a smaller portion of a year, may for some purposes be considered and denominated *a tenant for years* (*a*). But this is a penal statute, and is to be construed strictly. A *tenant from week to week* I therefore cannot include in the description of “tenants for life, lives, or years;” and I do not remember any instance of a tenant for a less time than a year being held within this act of parliament.

The single rent had been paid into court, under a count for use and occupation; but as there was some irregularity in the manner of doing this, the plaintiff had a verdict, with nominal damages.

Garrow and Lawes for the plaintiff.

Park for the defendant.

[*Attorneys, Drew and Settree.*]

(a) Litt. § 67..

REX v. INHABITANTS OF SURREY.

Thursday,
June 14.

THIS was an indictment against the county of Surrey for not repairing a bridge. Plea, that *the said bridge* had been immemorially, and still ought to be, repaired by the inhabitants of the parish of *Frimley*.

It appeared that there anciently stood a small wooden bridge in the place in question; this was chiefly used by persons on foot; carts and waggons passed over it in times of flood; but on other occasions they generally went through a ford alongside; it was not of sufficient strength to bear a waggon loaded as waggons now are, but was sufficiently strong to bear the loaded waggons that travelled in that part of the country, where the roads were bad, while it stood. This old bridge had been repaired by the parish of *Frimley*. About forty years ago it was accidentally destroyed, and on the same site there was built by the trustees of the adjoining high road, a new brick bridge twice the breadth of the former, over which all carriages travelling this road have passed at all seasons of the year ever since.—The new bridge has never been repaired by the inhabitants of *Frimley*, but exclusively by the trustees of the high road.

A particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood. About 40 years ago the trustees of the turnpike road built on the same site, a much wider bridge of brick, which has been constantly used ever since by all carriages passing that way.

—Held that to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired and still ought to repair the *said bridge*, was not supported by evidence of the above facts; and that the burthen of repairing the new bridge must be borne by the county at large.

Lord ELLENBOROUGH.—How do you make out that

1810.

the parish of *Frimley*, has immemorially repaired the *said bridge* mentioned in the indictment.

Rex v.
Inhabitants
of
SURREY.

Marryat, for the county, contended that the bridge now standing having been substituted for the ancient one, they must in contemplation of law be considered the same. Although a bridge be taken down and rebuilt, its identity is not destroyed; and in all pleadings of this sort, it is averred, that a particular parish or the owners of a particular estate have immemorially repaired the bridge in dispute, whatever changes may have taken place in its structure. In this case, there had been an ancient carriage bridge repaired by the parish. Therefore according to *Rex v. Inhabitants of Cumberland*, 6 T. R. 194, the parish was bound to widen it as the exigencies of the public required. The new bridge had been built and repaired by the trustees of the turnpike road; but they must be considered in this, merely the agents of the parish, from whom they had received the sum of £10.

Lord ELLENBOROUGH. I am clearly of opinion that the plea in this case is not substantiated. Not only is the new bridge different in its structure and materials from that repaired by the parish, but it is applied to very different uses. The ancient bridge was chiefly a footbridge, and carriages do not seem to have passed over it, except in times of flood. The present bridge is crossed by every carriage travelling along the road, and the ford is entirely disused. I therefore do not think that the bridges are in any sense the same. The case of *Rex v. Inhabitants of Cumberland*, was carried by

by writ of error to the House of Lords, and some doubts were entertained upon the doctrine of the Court of K. B. but it was thought that the point was not properly raised by the record. Here, however, there cannot properly be said to have been an ancient carriage bridge repaired by the parish, and the case comes much nearer *Rex v. West Riding of Yorkshire* (*a*); where to an indictment for not repairing a bridge, the plea alledged that certain *townships* had immemorially used to repair the said bridge, and it appearing that the townships had enlarged the bridge to a *carriage bridge*, which they had before been bound to repair as a *foot bridge*, the Court held that the plea was not supported. The general principle is established by a great variety of cases, that if a bridge be built by an individual, or township, or parish, which they were not bound to build or keep in repair, but which is used by the public, and is found a public benefit, the burthen of repairing it falls upon the county at large. The parish of *Frimley* was not compellable to build or keep in repair a brick bridge for the convenient passage of carriages at all seasons of the year; and the county must repair the new bridge, which has been used beneficially as a carriage bridge, by whomsoever it may have been erected.

Verdict against the county.

The *Attorney General* and *Lwes* for the prosecution.

Marryat and *Nolan* contra.

[*Attorneys, Dyne and Alcock.*]

(*a*) 2 East 353, n.

H h

 ADJOURNED Sittings IN LONDON.

1810.


 Tuesday
June 19th.

Roscow v. HARDY.

If a bill of exchange is presented for acceptance and not accepted, the drawer and indorsers are discharged by want of due notice of its being thus dishonoured ; although the holder presents it for payment when due, and then gives them notice of its being dishonoured both for non-acceptance and non-payment.

THIS was an action against the defendant as indorser of a bill of exchange for 50*l.* dated January 4th, 1810, drawn by *James and Peter Walmsley of Manchester*, upon *Shaw and Edwards in London*, payable three months after date, to the order of *Ralph Kirk*.

Kirk having indorsed to the defendant, and the defendant to the plaintiff, the bill passed through various other hands, there being above twelve indorsements upon it. On the 23d of January it was in the possession of the *Warrington Bank*, who presented it for acceptance on that day. It was then dishonoured for non-acceptance ; but the holders kept it in their hands, without giving any notice of this dishonour till the 7th of April, when the bill being due, they presented it to the drawees for payment, and payment was refused. The bill was immediately returned to the plaintiff, who took it up. In the usual time after the bill had become due, a letter from the holders was communicated to the defendant, stating that the bill had been dishonoured for non-acceptance and non-payment.

Park for the defendant contended, that the plaintiff had paid in his own wrong; and that the defendant was discharged, having had no sufficient notice of the dishonour of the bill for non-acceptance.

1810.
Roscow
v.
Hardy.

Topping, contra, argued that if a bill was presented for payment after being refused acceptance, notice of the dishonour for non-acceptance was unnecessary, or might be given at the same time with the notice of the dishonour for non-payment. There being no necessity for presenting a bill payable after date for acceptance, no injury could be sustained by the drawer or indorser from the want of notice ; and if this objection were to hold, it would greatly impede the circulation of bills of exchange ; for by looking at a bill which is unaccepted, it is impossible to say whether it may not have been presented for acceptance, and the drawer and indosers be discharged by the laches of a former holder.

LORD ELLENBOROUGH.—I consider it to be part of the usage and custom of merchants, for the holder of a bill which is refused acceptance, to give immediate notice of its dishonour to the drawer and indorsers. If the bill be payable at a certain time after date, there is no occasion to present it for acceptance at all ; but if it be presented, and dishonoured for non-acceptance, notice becomes requisite in the same manner as upon a dishonour for non-payment. Nor is the omission cured by the bill being presented for payment, and the subsequent notice given to the defendant. The information that the bill had been refused acceptance,

H h 2 could

1810.

Roscow

v.

MARDY.

could then be of no use to him ; and if entitled to this at all, he was entitled to it in a reasonable time after the circumstance actually happened.

Plaintiff nonsuited.

In the ensuing term, *Topping* moved to set aside the nonsuit, particularly on the ground that the plaintiff was ignorant of the first dishonour of the bill when he paid it. But the Court clearly thought, that the previous indorsers were entitled to regular notice of that dishonour, and that if they were once discharged, their responsibility could not be revived by shifting the bill into other hands (a).

Rule refused.

Topping and *Clarke* for the plaintiff.

Park and *Littledale* for the defendant.

[Attorneys, *Windle and Cooper.*]

(a) 12 East 434.

1810.

BATEMAN v. JOSEPH.

Wednesday,
June 20th.

THIS was an action on a bill of exchange, drawn and indorsed as follows :

“ Liverpool, 24th June, 1809.

“ Three months after date, pay to Abraham Joseph 100*l.* value received.

“ I. Dance.

“ To R. Perry, London.

(Indorsed) “ *Abraham Joseph.*

“ T. Parry.

“ L. Satterthwaite.

“ *S. Bateman.* ”

“ R. Jones.”

The holder of a
bill of exchange
is excused for not
giving regular
notice of its be-
ing dishonoured
to an indorser, of
whose place of
residence he is
ignorant, if he
use reasonable
diligence to dis-
cover where the
indorser may be
found.

When the bill became due on the 27th of September, it was in the hands of an indorsee in *London*, who on the 28th sent off a letter by the post, giving notice of its dishonour to *Jones* at *Manchester*. This, *Jones* received on the 30th, and the same day communicated to *Bateman*, the plaintiff, before the post for Liverpool went off. *Joseph* the defendant resides in Liverpool; but that fact was not then known to the plaintiff. The plaintiff went to the counting house of *Satterthwaite*, his immediate indorser, in *Manchester*, to make inquiries upon the subject, but could gain no information. *Satterthwaite* himself was then from home, but returned to *Manchester* late in the evening of the 3d of October, and stated

1810.

BATEMAN

v.

JOSEPH

resided at *Liverpool*. The next morning, the plaintiff wrote a letter to him there, giving him notice of the dishonour of the bill.

Garrow for the defendant contended, that he was discharged by want of due notice of the bill being dishonoured. When the plaintiff originally took the bill from *Salterthwaite*, he was bound to inquire into the residence of all the prior indorsers, if he meant to rely upon their credit; and it would have the worst consequences if an indorser could be called upon at any distance of time by a person saying he was unacquainted with his place of abode. On the first three days of October, the defendant might have had an opportunity of recovering the amount of the bill from the drawer or acceptor, which was gone before the notice actually arrived. The plaintiff had not used due diligence to obtain the information he pretended to want. Why had he not applied to the drawer or acceptor, whose residences were blazoned on the face of the bill? There was no evidence even of any inquiry being made of bankers at *Manchester*, from any of whom the desired information might have been expected. At any rate the plaintiff's ignorance could not prolong the responsibility of the defendant.

Lord Ellenborough.—When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonour of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself

to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonour of the bill, ~~within~~ the usage and custom of merchants. The present is a question of fact, and the jury will say, Whether the plaintiff between the 30th of September, and the 3d of October, used reasonable diligence to ascertain the residence of the defendant?—His lordship was rather inclined to think that there had been *laches* in not making further inquiries.—But—

The jury found for the plaintiff

In the ensuing term, *Garrow* moved to set aside the verdict, on account of the supposed *laches* of the plaintiff, in not giving earlier notice of the dishonour of the bill.

But the Court were all of opinion that the question had been properly left to the jury, and refused a rule to shew cause (a).

Park and *Richardson* for the plaintiff

Garrow for the defendant.

[Attorneys, *Willis* and *Palmer*, and *Tomlinson*.]

(a) 12 East 433.

1810.
BADEMAN,
v.
JOSTEN.

CASES

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B.

At the Sittings after Trinity Term,

50 GEORGE III.

ADJOURNED SITTINGS AFTER TERM IN LONDON.

1810.

If the owner of
a chattel, gra-
tuitously permit
another person
to use it, the
owner may
maintain *trespass*
for an injury
done to it, while
it is so used.

LOTAN v. CROSS.

TRESPASS for running against the plaintiff's chaise.

It appeared that the plaintiff, a stable-keeper, was owner of the chaise; but that when the injury was done, it was in the possession of one *Brown*, a friend of his, whom he had permitted to use it.

* The objection being taken, that trespass could not be maintained by the plaintiff under these circumstances,

Lord

Lord ELLENBOROUGH said, the property is proved to be in the plaintiff, and *prima facie*, the thing is to be considered in his legal possession, whoever may be the actual occupier. Shew a letting for a certain time to *Brown*, and the possession would be in him; but a mere gratuitous permission to a third person to use a chattel, does not in contemplation of law, take it out of the possession of the owner, and he may maintain trespass for any injury done to it while it is so used (*a*).

The witnesses stated, that the defendant seemed to have no intention of running his carriage against the plaintiff's chaise; and that the accident appeared to arise entirely from the negligent manner in which the defendant was driving.

Park thereupon objected that the action should have been case and not trespass.

Lord ELLENBOROUGH.—The injury to the plaintiff being immediate from the act done by the defendant, it was settled in *Leame v. Bray* (*b*), that trespass is the proper remedy, and that the defendant's intentions were immaterial.

Verdict for the plaintiff.

(*a*) *Vide Smith v. Milles, Harper, 7 T. R. 9.*
1 T. R. 480. Ward v. Macau. (*b*) *3 East, 393.*
ley, 4 T. R. 489. Gordon v.

1810.

LOTAN
v.
 CROSS.

If an injury is received from the immediate, though unintentional, act of another, the remedy is trespass, and not case; and the Court of C. B. will not permit this doctrine to be questioned on a motion for a new trial.

Park.

1810.

LOTAN
v.
CROSS.

Park, in the ensuing term, moved for a new trial, on the ground that the action was misconceived, and stated, that *Leame v. Bray* had been over-ruled by the Court of C. P. in *Huggett v. Montgomery*, 2 N. Rep. 446.

CUR. If we are desired to review the case of *Leame v. Bray*, the matter should be brought before us in a different shape, than a motion for a new trial. We do not entertain so slight an opinion of our own judgment, as to allow it to be thus canvassed. We will wait for some case where the question is raised upon the record, and may be carried farther.

Rule refused.

Vide Covell v. Laming, 1 Camp. 497. *Rogers v. Imbleton*, 2 N. R. 117.

Friday,
July 27.

Freight cannot be recovered on a charter-party, unless the stipulated voyage has been actually performed; and there is no implied promise to pay a compensation for carrying goods a part of the voyage, unless they are voluntarily accepted at a place short of the port of destination.

OSGOOD v. GRONING.

IN this case two issues were directed by the Lord Chancellor, to try, 1st, "Whether the plaintiff was entitled to any, and what sum of money for freight on the cargo of the ship Neptune, deposited in the West India and London Docks?" and, 2dly, "Whether the plaintiff was entitled to any, and what sum

sum, by way of *compensation*, for the carriage of the goods in the said ship, from Charlestown to the port of London?"

1810.

Osgood
v.
Groning.

By a charter-party dated 2d July 1807, the owner of the American ship *Neptune*, of which the plaintiff was master, let her to freighter to the defendant for a voyage from *Sandy Hook* to *Charlestown* to take in a cargo, and from thence to *Tonningem*, *Amsterdam* or *Rotterdam*. The owner covenanted that after the ship should be completely loaded, she should set sail from *Charlestown*, and (the dangers of the seas and the restraints of rulers and princes excepted) proceed for *Tonningem*, *Amsterdam* or *Rotterdam*, and there deliver the cargo to the freighter or his agents; and it was further stipulated that if advice should be received at *Charlestown*, previous to the sailing of the ship from that place, that the blockade had been taken off the river *Elbe*, the freighter should be at liberty to send her to *Hamburg* direct, in lieu of the other ports.

In August 1807, the *Neptune* arrived at *Charlestown*, and there took in a cargo of sugar and rice, the property of the defendant, consigned by the bills of lading to *Messrs. R. Groning and Co. of Hamburg*, to be delivered to them at *Tonningem* (or in case the blockade of the river *Elbe* was taken off, to proceed on to *Hamburg* direct), on payment of freight, pursuant to the charter-party.

The plaintiff's ship was proceeding up channel
on

1810.

O'SGOOD
v.
GRONING.

on her way to *Hamburg*, when the plaintiff was informed of the two orders in council of his Britannic Majesty, issued in Nov. 1807, whereby it was ordered that every vessel, trading from or to the ports and places of any country at war with his said Majesty, and all other ports or places in Europe from which, although not at war with his said Majesty, the British flag was excluded, should, together with all goods and merchandises on board, be captured and condemned as prize; but that all vessels which should arrive at any port of the United Kingdom, in consequence of having received information of this regulation, subsequent to taking their cargoes on board, should be permitted to proceed on their voyage to their original ports of destination, if not previously unlawful.

The plaintiff in consequence, brought his ship to *Sheerness*, and himself came up to London, for the purpose of consulting the defendant's agents here.—They, in a short time procured him a licence from his Majesty, for the *Neptune* and her cargo to proceed from *Sheerness* to the port of *Rotterdam*, or any port in the north sea, and pressed him to proceed to *Rotterdam* accordingly. But he found that by a decree of the French Emperor *NAPOLFON*, dated 13th of Nov. 1807, the ship and cargo would have been liable to confiscation, on her arrival at *Rotterdam*, or if examined on the way thither by any French cruiser, for having touched at an English port. He therefore refused to proceed on the voyage, but offered to deliver up the cargo to the defendant's

agents here, on being paid the freight and charges due upon it. They refused to receive it, and insisted that he was bound to complete the voyage, according to the terms of the charter-party. He maintained on the other hand, that he was not compellable to expose his ship to the danger of confiscation. He therefore brought the ship into the port of London, and landed the rice at the London docks, and the sugar at the West India docks. He afterwards again tendered the cargo to the defendant's agents, on being paid the freight and charges. They refused to pay him any thing; and as they apprehended he was going to sell the cargo to satisfy himself, they filed a bill in the defendant's name, praying that he might be enjoined from doing so, and that he might be decreed to deliver up the cargo to them, without prejudice to any claim of the defendant against him, for a breach of the charter-party and bills of lading. The plaintiff in his answer set up the lien he had upon the cargo for freight and charges. The injunction was granted; but the Lord Chancellor ordered these issues to be tried, before making his final decree. In the mean time, the goods were by consent delivered to the defendant's agents, without prejudice to the respective rights of the parties.

Scarlett for the plaintiff argued, that as the voyage had become impossible, the plaintiff was entitled to the full freight for the goods, if they were accepted here; and that at any rate, he was entitled to some compensation for bringing them from America to Great Britain, which it could not be denied was beneficial to the freighters.

The

1810.

Osgood
v.
Groning.

1810.
 OSGOOD
 v.
 GRONING.

The *Attorney-General*, on the other side, observed that possession of the goods had not been claimed here, till after they had been landed by the captain, and that they could not be considered as accepted by the consignee, as they had been taken possession of without prejudice.

Lord ELLENBOROUGH.—It is clear that in this case the plaintiff can have no claim for *freight*. Freight could only be earned by performing the terms of the charter-party. Then, is he entitled to any sum by way of *compensation*, for the carriage of the goods from *Charlestown* to the port of *London*? His right to compensation must arise out of some contract express or implied. There is no express contract set up; and from what can we imply a promise to pay for the carriage of the goods to England? They are brought here instead of being conveyed to their port of destination, and an application being made to the Lord Chancellor to prevent their being tortiously disposed of by the captain, they are taken possession of on behalf of the consignee, without prejudice to the rights of the parties. This is no acceptance of the goods short of the port of destination, and no foundation for a promise to pay *pro rata itineris*. I am therefore of opinion, that both issues must be found for the defendant.

Verdict accordingly."

An application was afterwards made to the Lord Chancellor for a new trial; but his lordship fully approved of the direction given to the jury, and thought

thought that the issues had been properly found.— He directed, however, that an action should be brought by the plaintiff against the defendant for freight, &c., and that if it should appear, that the plaintiff could not have been reasonably required to proceed on the voyage, the defendant should admit that he had *accepted* the goods in the port of London.

1810.

Osgood
et.
Gronine.

This action was tried at the Guildhall sittings after last Michaelmas Term; when the jury being of opinion that the plaintiff might have been reasonably required to proceed on the voyage, found a verdict for the defendant.

Scarlett, Gaselee, and Littledale, for the plaintiff.

The *Attorney-General, Garrow, Park, and Richardson* for the defendant.

[*Attorneys, Sermon, and Kaye and Freshfield.*]

Vido Luke v. Lyde, 2 Burr. 882. *Cook v. Jennings*, 7 T. R. 381. *Smith v. Wilson*, 8 East. 437. *Hunter v. Prinsep*, 10 East. 378. *Liddard v. Lopes*, 10 East, 526.

4

1810.

Monday
July 30th.

When goods are sold to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time the bill if given would have become due.

PORTER and others, v. PALSGRAVE.

THIS was an action for not accepting a bill of exchange for the price of goods sold by the plaintiffs to the defendant, under the following contract:

“ Bought for Mr. Theodore Palsgrave of Messrs. William Porter and Co. 30 casks of St. Petersburgh ashes, at 60 *per cwt.*
 “ To be settled for by bill, at six months date, allowing 14 days for receiving and delivery.
 “ Draught and tare as customary.
 “ London, 21st November, 1809.”

It was clearly proved, that the defendant had been guilty of a breach of the contract stated in the declaration; and the only question was, whether the plaintiff was entitled to interest? A bill dated 5th December 1809, for 468*l. 2s. 6d.* the price of the goods, at six months after date, was drawn by the plaintiff upon the defendant, and refused acceptance.

The council for the plaintiff contended, on the authority of *Becher v. Jones*, *ante* 428, that he was entitled to interest from the 9th of June 1810, the day the bill, if accepted, would have become due.

* On the other side, it was argued, that *Becher v. Jones* was in the Exchequer chamber, where a different rule prevails, and the case of *Gordon v. Swan*, *ante*

ante 429, it is relied upon, in which it was decided by the court of K. B. that interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day.

1810.

PORTER
and Others
v.
PALSGRAVE.

Lord ELLENBOROUGH.—There, the purchaser had not stipulated to pay by a bill of exchange, which makes all the difference. If there is merely a day named when payment is to be made in cash, this is a provision that payment shall not be demanded earlier, and it afterwards becomes the common case of goods sold and delivered. But if the agreement is to pay by bill at a given date, this amounts to a promise to pay interest upon the price of the goods from the day when the period expires for which the bill would have to run. Had the bill in this case been accepted, interest would clearly have been recoverable upon it from the 9th of June, and the defendant cannot be allowed to profit by his own wrong.

Verdict accordingly.

The *Attorney-General*, *Garrow*, and *Taddy*, for the plaintiff.

Park and *Richardson*, for the defendant.

[*Attorneys, Kaye and Freshfield, and Gibbs.*]

Vide Marshall v. Poole, 13 East, 98. *Boyce v. Warburton*, post 480.

JONES v. MORGAN and another.

In an action against the drawee in law of a bill of exchange dishonoured for non-payment after being accepted, although it be unnecessary to set to the acceptance in the declaration, if it be tried, it must be proved, but no man can pay a bill till it was due, & it is unnecessary to prove the acceptance of the bill or the hand writing of the defendant himself and of the other parties to the bill.

THIS was an action on a bill of exchange, drawn by the defendants, payable to their own order, and indorsed by them to the plaintiff.

The bill was drawn upon one *T. Burt*, by whom it had been dishonoured for non-payment, and the declaration unnecessarily stated that he had *accepted* it according to the usage and custom of merchants.

No evidence could be adduced of his hand-writing; but it appeared that after the bill was due, one of the defendants several times promised the plaintiff to pay it.

The plaintiff's counsel contended, that there was no necessity to prove the acceptance, as it had been stated unnecessarily, the liability of the defendants at all events attaching upon the non-payment of the bill; and at any rate, that the acceptance was admitted by the promises to pay, after the bill was due and in the plaintiff's hands.

Lord ELLINBOROUGH was clearly of opinion that the acceptance being stated in the declaration, must be proved; and he was inclined to think at the trial that the promises to pay did not amount to an admission of the acceptance: he therefore directed a nonsuit. But upon a motion in the ensuing term to set the nonsuit aside, his Lordship and the rest of

the Court thought, upon the authority of *Lundie v. Robertson*, 7 East. 231, that the promises to pay were a sufficient admission of the acceptance; and upon the same evidence, at the sittings after Michaelmas term last, the plaintiff had a verdict.

1810.
JONES
v.
MORGAN
and Another,

Garrow and Wyld for the plaintiff.

Jervis for the defendant.

BILL and others v. BELL.

ACTION on two policies of insurance.

The first dated 16th August 1809, was declared to be "on the contingency of the Rising Sun, Captain Loring, loading a cargo at Riga," with a subsequent clause, "that if the ship should not load a cargo at Riga by any act of the Russian government, the assured were to receive a total loss," and the insurance was declared to be "on seamen's wages, premiums of insurance, and all charges whatever, valued at 1600*l.*"

Wednesday,
Aug. 1.
Policy at and
from Riga to the
United King-
dom, on ship and
freight, declared
to be *in continu-
ation* of two other
policies, which
were on ship on-
freight on a voy-
age from the
United King-
dom to the ship's
port of discharge
in the Baltic,
during her stay
there, and from
thence back to
her port of dis-
charge in the
United King-
dom. The ship
was seized and

condemned at Riga before she had discharged her outward cargo. Held that the first policy could not be applied to the outward freight.

It is stipulated by a policy of insurance from Riga to the United Kingdom, "that if the ship should not load a cargo at Riga by any act of the Russian government, the assured were to receive a total loss." The ship is seized and condemned by the Russian government, before her outward cargo is discharged—This is a total loss within the meaning of the policy.

A policy at and from a foreign port, attaches when the ship is arrived there in good physical safety, although, from political causes, she may be in great danger of condemnation.

1810.
Br. &
and Others
v.
B.L.L.

The second policy, dated 30th August 1809, was "at and from Riga to the ship's port of discharge in the United Kingdom, on ship Rising Sun, valued at 2000*l.* and on freight valued at 1200*l.*" and this policy was declared to be "in continuation of two other policies dated the 7th and 14th October 1808."

The two policies of which this was in continuation, were on the ship Rising Sun, valued at 2000*l.* on freight, valued at 1200*l.* and on a cargo of salt—"at and from Cork and Liverpool to the ship's port or ports of discharge in the Baltic, during her stay there, and at and from thence to her port or ports of discharge in the United Kingdom," and by a memorandum thereon, "in case of loss or accident on the outward voyage, a total loss was to be paid on the freight."

The ship arrived at Riga the 28th May 1809. A few days previous to her arrival, an order of the Russian government had been sent to *Riga*, directing that the papers of all ships arriving at any port in Russia shall be sent to *Petersburgh* to be examined before their cargoes were unloaded. The papers of the Rising Sun were accordingly sent there. On the 9th August the ship and cargo were put under sequestration, and on the 4th December they were seized and sold by the custom-house at *Riga*, under a sentence of condemnation for want of proper documents, *without the ship having discharged her outward cargo.*

On these facts *The Attorney General* contended, that

1810.

BELL
and Others
v.
BELL.

that the plaintiffs were clearly intitled to recover on the first policy on the contingency, and on the second as far as it applied to the *ship*. With respect to the *freight* insured by the second policy, it might be a more doubtful question. Taking the policy, which was "at and from Riga to the United Kingdom" by itself, he admitted that its import must be, that the freight insured was the freight of goods put on board to be carried on the homeward voyage, whereas the freight actually lost was that of goods carried on the outward voyage; but as this policy was declared to be in continuation of two former policies, which were on freight—*to the Baltic, during the ship's stay there from thence home*, he contended that this policy would take up all of that former risk to which its words could apply, and that as the ship was earning freight at *Riga*, which was lost, and *which the former policies could have covered*, and as the present policy was *on freight at Riga, in continuation of those former policies*, the freight so lost would be covered by the present policy.

Lord ELLNBOROUGH.—This policy was in continuation of the former, according to the subject matter expressed in it, and that was the freight of the homeward cargo. It cannot cover this loss.

Garraway and Park for the defendant contended, that there was no inception of the risk on either policy. With respect to the first, the insured were to recover if the ship *did not load* by any act of the Russian government. In order to establish a loss by the risk thus insured against, it must be shewn

II 3 * * * that

1810.

BELL
and Others

that the ship was in a condition to load a cargo, and that she was prevented from *loading it* by the act of the Russian government; but in fact, she was not suffered to *unload her outward cargo*, so that she was never in the condition in which the loss insured against could attach.

Lord ELLENBOROUGH. It was the act of the Russian government which prevented her unloading her outward cargo, and which, *by that means*, effectually prevented her from loading her homeward cargo.

With respect to the second policy, they contended, that the ship was never in good safety at Riga, for that at the instant of her arrival her papers were sent to Petersburg, and she was placed in a state of restraint which terminated in her total loss. The circumstance therefore which occasioned her total loss having taken place concurrently with her arrival when this policy was to attach, it must be considered as a loss not within the scope of this policy. Besides, this incipient loss took place before the termination of the insurances on the *outward voyage*; for they did not cease till the ship had moored in safety 24 hours, which in this case she cannot be said to have done, and therefore the policy on the *homeward voyage* had not begun to operate.

Lord ELLENBOROUGH.—The safety required to give a good commencement to the risk on the ship, is a physical safety from the perils insured against, and not a freedom from political danger. I think this

this ship was in safety at Riga, within the meaning of this insurance.

1810.

BELL
and Others v.
BELL.

On the 29th May, the day after the ship's arrival at Riga, the consignees of the cargo there, *Messrs. Hill, Jacobi and Co.* wrote a letter to the plaintiffs, which was received by them in London the 27th July, in which they said, "that the order lately received there; to send the papers of all vessels that should arrive to Pittsburgh had produced a great sensation on account of the detention which it would occasion of the vessels; that the *Riga Sun* must share the same fate; that her papers had been sent to Pittsburgh; and that till they heard a favourable result, they should defer unloading her or preparing a return cargo." This letter was not shewn to the underwriters; but the broker who effected the insurance, stated the ship's papers were sent to Pittsburgh for examination.

Garrow contended, that the non-production of this letter to the underwriters was a material concealment, inasmuch as it expressed a much greater degree of danger to the ship and cargo than the simple communication made by the broker, and a danger which in fact terminated in her total loss.

Lord ELLENBOROUGH.—The assured are only bound to communicate facts. The broker did communicate the fact of the ship's papers being sent to Pittsburgh for examination. He was not bound to communicate the sensations and apprehensions which that fact produced at Riga.

1810.

BILL
and Others
v.
BILL.

Verdict for the Plaintiff, excluding the freight on the second policy.

In the ensuing term, a motion was made for a new trial on the part of the defendant.

The *Court* were clearly of opinion, that the contingency had happened which was mentioned in the first policy, and that the ship had been in good safety at Riga within the meaning of the second: but they granted a rule to shew cause on the ground of the concealment.—Cause, however, being shewn in Hilary Term, the judges all agreed, that it was sufficient for the broker to state the fact of the papers of the *Rising Sun* being sent to Petersburg, and the rule for a new trial was discharged.

The *Attorney General* and *J. Warren* for the plaintiff.

Garrow, Park and Carr for the Defendant.

[*Attorneys, Wadeson, and Gregg & Co.*]

BOYCE and another, v. WARBURTON.

If goods are sold to be paid for by a bill of exchange, in an action by the vendor against the purchaser for

not giving a bill accordingly, interest will be allowed from the time the bill, if given, would have become due, whether the defendant has, or has not, accepted the goods.

THIS was an action for not accepting a quantity of deals purchased by the defendant from the plaintiff, *to be paid by bill at 4 months,*

The

The breach of contract on the part of the defendant was clearly proved; and the only question was, whether the defendant should be allowed interest on the amount of the stipulated price from the time the bill, if given, would have become due.

1810.
Boyce
and another
v.
WARBURTON.

Lord ELLENBOROUGH was of opinion, that interest should be allowed, and directed it to be added to the damages.

In the ensuing term, a rule was applied for to set aside the verdict on this ground, or to reduce the damages to the amount of the price of the deals; and it was argued, that if interest could be allowed where there was no promise to pay it, nor any written security, still that this was different from the case of refusing to pay for goods after accepting them, as the vendor had still the goods in his hands, and the purchaser could not be supposed to have made any profit by them. But

—The *Court* said, that in either way the vendor was deprived of the use of money to which he was entitled on a certain day; and that as interest would have been allowed had the bill been given but not paid, it would be unjust and absurd to withhold interest where the purchaser had from the beginning broken every part of his contract.

Rule to shew cause refused.

The *Attorney General* and *Marryat* for the plaintiff.

Garrow and *Lawes* for the defendant.

Thursday,
August 2.

If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough to make the owners liable for the non-delivery of goods, to shew that they were put on board the ship to be carried in this voyage, unless it be proved that they were received on board by some person appointed or authorised by the owners.

MACKENZIE v. ROWE and others.

ACTION for the non-delivery of fifty casks of oats, shipped on board the *Trafalgar*, to be carried from London to Surinam.

The facts relied upon by the plaintiff were, that the defendants were registered owners of the ship in question ; that the oats had been put on board her in the port of London, for the purpose of being carried to Surinam, to which place she was then bound ; and that afterwards, the ship not being able to make Demarara, the captain sold the oats exactly under the same circumstances as are mentioned in *Tan Omeron v. Dowick*, ante 42, where it was held that the captain had no implied authority to do so.

But there was no evidence that the oats had been received on board the ship by any person appointed by the defendants ; and it was proved that they had chartered her for this voyage to Surinam, to a person of the name of *De Beur*, who had put her up as a general ship.

Lord ELLENBOROUGH held that the registered owners of the ship were not, under these circumstances, liable for the non-delivery of the oats, and directed a nonsuit.

The *Attorney General* and *Taddy* for the plaintiff.
Park and *Littledale* for the Defendant.

Vule Parish v. Crawford, Stra. 1251. *Vallejo v. Wheeler*, Cowp. 143. *Rich v. Coe*, Cowp. 636. *Frazer v. Marsh post*.
Rod-

RODGERS v. FORRESTERS.

Tuesday,
July 31.

THIS was an action of covenant on a charter-party, whereby the plaintiff let to the defendant the ship *Margaret* to freight for a voyage from *London* to *Oporto* and back, to bring home a cargo of wine, and the plaintiff agreed, "that the said freighter should be allowed the usual and customary time to unload the said ship or vessel, at her port of discharge.

The declaration stated, that the ship arrived in the port of London, her port of discharge, on the 26th of August 1809, and that the usual and customary time to unload the said ship amounted to seven days from thence next following; by means whereof it was the duty of the said freighter to unload the said cargo of and from the said ship in such usual and customary time as aforesaid; but that he wholly omitted so to do, and kept and detained the said ship, with the said cargo on board thereof, forty-nine days over and above the said usual and customary time allowed for unloading the same within the port of London aforesaid;—whereby the plaintiff, during all that time, lost and was deprived of the use and profit of the said ship.

If the freighter of a ship employed to bring a cargo of wine into the port of London, covenant to unload her in the usual and customary time at her port of discharge, he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn into the bonded warehouses.

The *Margaret* actually entered the London Docks with her homeward cargo on the 25th of August, and was reported the following day. On the 31st of the same month, the wines were bonded by the defendant, and he was ready to have received them, if they could have been unloaded. But on account of the

1810.

RODGERS
v.
FORESTER.

the crowded state of the London Docks at this time, the ship could not get a birth till the 20th of October, and was not fully discharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much shorter time; but the superintendent of the London Docks said, he had never since the bonding system was introduced, known a cargo of wines brought by a ship so large as the *Margaret* landed and delivered; such cargo had always been bonded.

The *Attorney General* contended, on the authority of *Randall v. Lynch, ante 352.*, that the freighter was liable for the detention of the ship in the Docks beyond the time when she might have been discharged, had the duties been immediately paid.

Lord ELLNBOROUGH. In that case, a specific period of forty days was fixed by the charter-party for loading and unloading the cargo! Here, the stipulation is, that the freighter shall be allowed, *the usual and customary time* to unload the ship in her port of discharge. What is the usual and customary time for a ship to unload a cargo of wines in the port of London? According to the evidence,—when the ship gets a birth by rotation, and the wines can be discharged into the bonded warehouses. The wines might have been landed sooner, by an immediate payment of the duties; but since the bonding system was introduced, this has ceased to be the usual and customary mode of unloading such a cargo. I am therefore of opinion, that the defendant has not broken the implied covenant, arising from the terms of the

charter-party, to unload the ship in the usual and customary time for that purpose at her port of discharge, and that he is entitled to a verdict.

The Jury found accordingly.

The Attorney General and *Marryat* for the plaintiff.

Topping and *J. Warren* for the defendant.

Vide Burmester v. Hodgson, post 488.

SCHOLEY v. RAMSBOTTOM and others.

THE defendants are bankers, with whom the plaintiff kept cash. This was an action to recover the balance of his account, and the only question was, whether they were entitled to take credit for a sum of 366*l.*

On Wednesday the 20th. of September 1809, the plaintiff being indebted to *Messrs. Miller and Co.* drew a cheque in their favour in the following form:

“ London, September 20th 1809.

“ Messrs. Ramsbottom, Newman, Ramsbottom
“ and Co.

“ Pay *Messrs. Miller and Co.* or bearer, three
“ hundred and sixty six pounds.”

“ £366 ” “ Robert Scholey.”

1810.
RONGERS
v.
FORSTER,

Saturday,
August 4.

If bankers pay a cancelled cheque drawn by a customer, under circumstances which ought to have excited their suspicion and induced them to make inquiries before paying it; they cannot take credit for the amount.

But

1810.

SCHOOL
v.
RAMSBOTTOM
and Others.

But finding that the sum was incorrect, he tore the cheque into four pieces, which he threw from him, and drew another cheque in the same form for 360*l.* The latter was presented for payment, and paid by the defendants, the same day.

On Monday the 25th of September, the first cheque was likewise presented for payment by a person unknown. The four pieces into which it had been torn were then neatly pasted together upon another slip of paper; but the rents were quite visible, and the face of the cheque was soiled and dirty. The defendant's clerk paid it, however, without making any inquiries.

Lord ELLENBOROUGH was of opinion, that under these circumstances, bankers were not justified in paying a cheque; and the jury found a verdict for the plaintiff for 366*l.*

Garrou and Lawes for the plaintiff.

Park for the defendants.

Bankers cannot charge *interest upon interest*, without an express contract for that purpose.

Duves and others v. Pinner,
Sittings after M. T. 1810.

Action by bankers for money, which the defendant had at different times over-drawn. In mak-

ing up the account, the balance was struck by the plaintiff at stated times, and interest then charged upon the sums found to be due.—But Lord ELLENBOROUGH would only allow simple interest upon the sums advanced.

COURT OF COMMON PLEAS.

ADJOURNED Sittings IN LONDON.

ABITBOL v. BENEDITTO.

Tuesday,
July 31.

THIS cause being called in its regular order on a former day, - - - ,

Counsel, although retained for the plaintiff, cannot withdraw the record till a brief is delivered.

Shephard, serjeant, observed, that neither the plaintiff's attorney nor witnesses were present; but if he was regular, according to the practice of the court, situated as he was, he would withdraw the record: He had been retained in the cause, but no brief had been delivered to him, nor had he any instructions.

Lens, serjeant, said, that he was ready on the part of the defendant, who was in custody; and insisted that under these circumstances, the record could not be withdrawn, and the plaintiff must be nonsuited.

Lawrence, J. was of opinion, that without a brief being delivered, counsel had no authority to withdraw the record; and directed a nonsuit to be entered, unless a brief had been previously left at chambers.

Lens now moved, on the ground that no brief had been so left, that the nonsuit should be absolute, and that the defendant should be discharged out of custody.

Sir

1810.

ABOTBOL
v.
BENIDITTO.

Sir JAMES MANSFIELD, C. J.—I think a counsel can only speak of act in a cause from his brief. How else is he to know any thing of the matter? He cannot be expected to carry his retainer book along with him, and that would only inform him that when the cause was tried he was to be for the plaintiff or for the defendant. If there has been a practice of allowing the record to be withdrawn under similar circumstances, it must have been instances where no opposition was made. I have often said, I would listen to no application till briefs were delivered.—And I am sure that this rule is most for the advantage both of the parties and of the profession. Let the nonsuit stand; but you must proceed to discharge the defendant by summons in the usual way.

Friday,
August 3.

BURMEISTER v. HODGSON.

If by the bill of lading of a cargo of brandy brought into the London Docks, no time is stipulated within which it shall be unloaded, the implied contract

INDEBITATUS assumpsit for demurrage, and for the use and hire of a ship.

The defendant was consignee of a cargo of brandy brought from *Charente* to London by the ship *Athalia*,

on the part of the consignee, is to discharge the ship in the usual and customary time for unloading such a cargo—which is the time within which the brandies can be unloaded in the Docks into the bonded warehouses. Therefore, the consignee is not, under these circumstances, liable to make compensation to the owner of the ship, in the nature of demurrage, for any delay occasioned by the crowded state of the London Docks, although the cargo might have been landed sooner, if the duties had been immediately paid.

of

of which the plaintiff was master. In the bill of lading, there was no stipulation whatever for demurrage, or for unloading the brandy in any particular time.

1810.

BURMESTER
v.
HODGSON.

The ship entered the London Docks on the 19th of August 1809; but as the docks were extremely crowded, and the brandies were to be bonded, she was not able to begin to unload till the 11th of October, and did not discharge the whole of her cargo till the 19th of the same month, making a period of 63 days from the time she entered. Supposing the brandies were to be bonded, the defendant was not guilty of any wilful delay, but had the duty been paid immediately, they might have been landed much sooner. It appeared, however, to be the inviolable practice to bond cargoes of this sort. Even when the cargo is bonded, if the Docks are not over crowded, 20 or 23 days are a sufficient space of time for unloading.—The plaintiff therefore insisted that he was entitled to a compensation in the nature of demurrage, from the time the ship might have been unloaded, till she was completely discharged. But the case of *Rodgers v. Forrester* (^a) being cited,

MANSFIELD, C. J. was of opinion that it could not be distinguished from the present. Here the law could only raise an implied promise to do what was there stipulated for by an express covenant, viz.

(a) *Ante*, 483.

1810.
—
BURMESTER
v.
HODGSON.

discharge the ship in the *usual and customary time* for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded, in her turn, into the bonded warehouses. Such time, has not been exceeded by the defendant. If the brandies were to be bonded, they could not be unloaded sooner, and the defendant seems to have been as anxious to receive ~~as~~ the plaintiff was to deliver them.

Verdict for the defendant.

Shepherd and Best, serjeants, for the plaintiff.

Lens, serjeant, and Marryat, for the defendant.

Vide Randall v. Lynch, ante 352.

OXFORD CIRCUIT.

Summer Assizes, 50 George II.

MONMOUTH.

CORAM LAWRENCE, J.

EVANS v. EVANS.

1610.

Tuesday
August 14th.

TRESPASS for breaking and entering the plaintiff's close, in the parish of *Newport*, in the county of *Monmouth*, and cutting down the trees growing therem. Second count, for taking and carrying away the plaintiff's trees, and converting them to the defendant's use.

Tenant for years
cannot maintain
trespass *de bonis
asportatis* for
timber cut down
on the demised
premises.

It appeared that the trees which the defendant cut, grew in a piece of ground which the plaintiff occupied as tenant for a term of years under one *Hawkins*; but that there is no such parish as that stated in the declaration.

Wigley for the plaintiff contended that although he failed on the first count, he might proceed on the

1810.

EVANS
v.
EVANS.

second, as the tenant, even after the trees were cut down, had such a possession of them as to enable him to maintain trespass for taking them from the demised premises."

LAWRENCE J.—The plaintiff had no property or interest whatsoever in the trees after they were severed from the freehold. They were then in the legal possession of the reversioner, and he alone could maintain trespass for the asportation.

Plaintiff nonsuited.

Wigley, for the plaintiff.

Dauncey, for the defendant.

Vide *Berry v. Heard*, Palm. 327. Cro. Car. 242. S. C. where it was decided after much consideration, that the landlord has such a possession of timber cut down during the continuance of the lease as to enable him to

maintain trover for it, because the interest of the lessee in the timber remained no longer than while it was growing on the land demised, and determined instantly upon the severance.

BISSE and others, Assignees of STOKES, a Bankrupt, *v.* RANDALL.

Tuesday
August 14

IN this case no notice had been given under Sir S. Romilly's Act, stat. 49 G. 3. c. 131.; and the proceedings under the commission were produced and read in the usual way. The only evidence of the petitioning creditor's debt, was the deposition of the petitioning creditor himself before the commissioners.

Abbott objected that this was insufficient, as the petitioning creditor was not a competent witness to support the commission, and the statute only rendered the depositions of those admissible in evidence who might previously have been examined *viva voce*.

LAWRENCE, J. If notice had been given, the plaintiffs would have been put upon strict proof of the petitioning creditor's debt, and the petitioning creditor would not have been a good witness to prove it; but I conceive the object of the act of parliament to have been, to make the depositions, by whomsoever sworn, sufficient evidence of the trading, act of bankruptcy, and petitioning creditor's debt, unless notice be given that the validity of the commission is contested.

The plaintiffs had a verdict.

Wigley and Puller, for the plaintiffs.

Abbott, for the defendant.

In an action by the assignees of bankrupt, if no notice be given under 19 Geo. 3. c. 131. that the validity of the commission is disputed, the petitioning creditor's debt is sufficiently proved by the deposition of the petitioning creditor himself before the commissioners.

BLREFORD.

CORAM LL BLANC, J.

Rex v EARDISLAND

Thursday,
August 16th.

If to an Indictment for not repairing a highway in a parish consisting of three townships, viz A B and C, there is a plea in the part of C, that each of the three townships has immemorially repaired its own highways separately, the records of indictment against the parish generally, for not repairing highways in A and B, with other wise is of not guilty, and conviction thereof upon, *in prima facie* evidence to disprove the custom for each township to repair separately, but evidence will be admitted that these pleads of not guilty were pleaded by inhabitants of A and B without the privity of the inhabitants of C.

THIS was an indictment against the parish of *Eardisland*, for not repairing a highway. Plea by the township of *Burton* in the said parish, that there are three townships within the parish, viz. *Eardisland*, *Burton*, and *Hardwicke*; that each township has from time immemorial separately repaired the highways within its bounds, and that the highway in question is in the township of *Eardisland*.—Traverse of the custom to repair separately.

On the part of the prosecution there were given in evidence several indictments against the parish of *Eardisland* for not repairing highways in the township of *Eardisland* and the township of *Hardwicke*, to which the general plea of *not guilty* had been pleaded, and on which the parish had been convicted.

On the other side they offered to shew, that the inhabitants of *Burton* were not aware of these pleas being

being pleaded ; but the Counsel for the prosecution insisted that these records were conclusive evidence of a joint obligation to repair being upon the whole parish.

1810.

REX v.
EARDIS-
LAND.

LE BLANC, J.—The records *prima facie* disprove the custom alleged ; but I will admit evidence that the pleas of *not guilty* were pleaded only by the Inhabitants of the townships of *Eardisland* or *Hardwicke*. They would have an interest upon these occasions to throw the burthen upon the parish at large, and the rights of the township of *Burton* cannot be affected by what they exclusively did.

Such evidence was given in respect to each of the indictments put in ; but the custom was negatived on other grounds, and the Jury found a verdict of *Guilty*.

Peake for the prosecution.

Puller and *Clive* for the township of *Burton*.

"CASES

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B.

At the Sittings in and after Michaelmas Term,

51 GEORGE III.

FIRST SITTINGS IN TERM AT WESTMINSTER.

LEE, Gent. One, &c. v. JONES.

1810.

Monday
November 19th.

In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what should appear to be due, and the master's allocatur thereupon.

ACTION on an Attorney's bill.

Park, for the plaintiff, contented himself with putting in an order of Mr. Justice GROSE, for referring the bill to be taxed by the Master, the defendant's undertaking to pay what should appear to be due, and the master's allocatur thereupon for the sum of 264*l.*

E. Lawes objected that this was insufficient.

Lord

Lord ELLENBOROUGH.—The *undertaking* admits the retainer, and binds the Defendant to pay the sum which the master shall find to be due.

The plaintiff had a verdict on the above evidence.

Park and —, for the plaintiff.

E. Lawes, for the Defendant.

[Attorneys, *Lee* and *Collingwood*.]

Where it is material for the defendant to shew that the action was commenced earlier than it appears to have been by the Nisi Prius record, the declaration delivered by the Plaintiff is admissible evidence.

Harris v. Orme, Sittings after Easter Term, 49 G. III.

In an action for goods sold and delivered, a question arose whether the action as to part of the

goods had not been commenced before the credit expired, which was not till April last. The record was entitled generally of Easter Term. To prove that the action had been commenced too soon, the declaration delivered by the plaintiff to the defendant in Hilary Term was offered in evidence, and held by Lord ELLENBOROUGH to be admissible for that purpose.

1810.

LEE, GENT.
One, &c.
v.
JONES.

SECOND Sittings in Term at Westminster.

Saturday,
November 17th.

NICHOLLS v. BOWES.

In an action
against the maker
of a promissory
note expressed to
be payable at a
particular place,
there is no neces-
sity for proving
that it was pre-
sented there for
payment.

THIS was an action brought by the plaintiff as indorsee of a promissory note drawn by the defendant in the following form :

"London, 1st February 1810.

*"Two months after date, I promise to pay 100*l.**
"to J. Lines, or order, at Messrs, Austen, Maunde,
"Austen, and Tilson's, Bankers, Henrietta Street,
"Covent Garden, London, for value received.

"T. Bowes."

The making and indorsing of the note being proved, *Burrell*, for the defendant insisted that the plaintiff was bound to show that the note was presented at the banking house "where it was made payable. He relied chiefly upon *Ambrose v. Hopwood*, 2 *Trant.* 61, where the Court of C. P. is represented to have held that, if in an action against the acceptor of a bill of exchange, the declaration states that it was accepted, payable at a banking house, the omission to allege that it was presented there for

for payment is fatal on general demurrer. It follows, of course, that such presentment must be proved at the trial; and the present case is much stronger, the place where payment is to be demanded, being in the body of the instrument, and part of the original contract between the parties.

A gentleman, at the bar, who had prepared the demurrer in *Ambrose v. Hopwood*, stated that the action was there brought against the *drawer* of the bill, not the acceptor, and that there was no allegation in the declaration, that the bill had been presented either at the place where it was made payable, or to the acceptor personally, so that it did not appear that there had been any default upon his part, or that the liability of the drawer had ever attached.

LORD ELLENBOROUGH.—I am clearly of opinion that in an action against the maker of a promissory note, the place where the instrument is made payable is merely to be considered a memorandum where payment may be demanded, and not a part of the contract. The maker of the note is liable every where, and, as against him, the bringing of the action is a sufficient demand.

The counsel for the plaintiff said, they had a witness to prove that the notice was presented at the bankers the day it became due.

Lord ELLENBOROUGH.—I am afraid to admit such evidence, less doubts should arise as to its necessity. And in a case like this, the plaintiff is certainly entitled
to

1810.

NICHOLLS

v.

BOWES.

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NICHOLLS

v.
BOWES.

to a verdict on proving the haad-writing of the maker and indorser of the note.

Verdict accordingly.

Nolan and Copley, for the plaintiff.

Burrell, for the defendant.

[Attorneys, *Flexney and Biden.*]

Lyon v. Sundius, 1 Campb. 423. Wild-v. Reppards, *ib.* 425. n.
Sed vide Colloghan v. Aylett, *post.*

Saturday,
November 17th.

In trespass for running with a cart against plaintiff's chaise, the defendant cannot give in evidence *under not guilty*, that the cart and the chaise were travelling on the high road in opposite directions, and that the collision between them happened from the negligence of the plaintiff, or from inevitable accident.

KNAPP v. SALSBURY.

TRESPASS for running against plaintiff's post chaise, in which he was travelling along the highway, with a cart, and killing one of the horses drawing the post-chaise, by the shafts of the cart.—Plea, *not guilty*.

The defence relied upon was, that the chaise and the cart were travelling on the road in opposite directions, and that the collision between them took place through the negligence of the plaintiff, or by mere accident, and without any default on the part of the defendant.

Lord

Lord ELLENBOROUGH.—These facts ought to have been pleaded specially. The only thing to be tried under the plea of *not guilty* is, whether the defendant's cart struck the plaintiff's chaise and killed his horse. That it did is now admitted; and the intention of the defendant is immaterial. This is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure the defendant is not liable; but as he in fact did run against the chaise and kill the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so. The plea denying these acts must clearly be found against him.

Verdict for the plaintiff.

Park and Knapp, for the plaintiff.

Jervis, for the defendant.

[*Attorneys, Abbot and Adams.*]

Vide Milman v. Dolwell, ante 378.

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**KNAPP
v.
SALSBURY.**

*
FIRST Sittings after Term at WESTMINSTER.

MOLONY, Esquire, v. GIBBONS.

Thursday,
November 29.

An action may
be maintained
upon a foreign
judgment obtain-
ed by default,
which states that
the defendant
appeared by at-
torney,--without
proving that the
attorney men-
tioned had autho-
rity to appear, or
that the defen-
dant was living
within the juris-
diction of the
foreign Court.

CTION on a judgment of the supreme court of
the island of Jamaica.

In the judgment, after the declaration, which was
in assumpsit, there was the following entry :

“ And the said *J. Gibbons*, by *J. Ferrier* his at-
“ torney, comes and defends the wrong and injury
“ when, &c. and says nothing in bar or preclusion
“ of the said action of the said *J. Molony*, whereby
“ the said *J. Gibbons* remains therein undefended
“ against the said *J. Molony*: Wherefore,” &c. [in
the common form.]

Garrow for the defendant insisted, as this was a
judgment by default, that the plaintiff was bound to
prove, that *Ferrier* was properly constituted the de-
fendant’s attorney, or at any rate, that the defendant
himself, pending the original action, “was living
within the jurisdiction of the supreme court ; and
he referred to *Buchanan v. Rucker*, 1 Camp. 63.

Lord

Lord ELLENBOROUGH.—I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege; and I must presume in the present case, that the Court saw *Ferrier* properly constituted attorney for the defendant.

Verdict for the plaintiff.

Park and Reader for the plaintiff.

Garrow, for the defendant.

[*Attorneys, Ross and Nethersole.*]

Vide *Saddler v. Robins*, 1 Campb. 253. *Hall v. Odber*, 11 Last 118.

1810.

MOLONY,
Esquire,
v.
GIBBONS.

BLACKHAN v. DOREN.

Tuesday,
December 1st.

ACTION against the defendant, as drawer of a bill of exchange for 250*l.* dated Kingston, Jamaica, October 1, 1809, on Messrs. Hunter and Co. in London, at six months after sight.

If the drawer of a bill of exchange when it is presented for acceptance, has effects in the hands of the drawee, though he is indebted to them to a much larger amount, another, without his previously, have appropriated the effects in their hands to

The bill was refused acceptance.

To excuse the sending of notice of the dishonour

the satisfaction of the debt; he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect under these circumstances that it would be accepted and paid.

of

1810.
 BLACKAN
 v.
 DOREN.

of the bill to the defendant, the plaintiff called a clerk of the drawees', who stated, that when it was presented they had produce in their hands belonging to him to the amount of about 1500*l.* but that he owed them 10,000*l.* or 11,000*l.* and that they had appropriated the effects in their hands to go in satisfaction of this debt.

Lord ELLENBOROUGH.—If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonour, and therefore he is not entitled to such notice. But the case is quite otherwise, where the drawer has a fluctuating balance in the hands of the drawee. There notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. I wish that notice had never been dispensed with, and then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still farther,—which I should do, if I were to hold that notice was unnecessary in the present instance.

Plaintiff nonsuited.

Park and Copley for the plaintiff.

Littledale.

Littledale, for the defendant.

1810.

[Attorneys, *Stott and Deneatt*.]

BLACKAN
v.
DOREN.

Vide Legge v. Thorpe, *ante* 310.

Dec ex. d. KNIGHT *v.* QUIGLEY.

Tuesday,
Dec. 4.

EJECTMENT to recover possession of a house
in *Conway Street*.

It appeared that *Knight* who had a lease of this house, wished to underlet it; that while it remained empty, the defendant had got into possession of it without *Knight's* privity, intending to take a lease of it from him; that some negotiation afterwards took place between the parties upon the subject; but that they disagreed about the valuation of the fixtures.

If a man gets into possession of a house to be let, without the privity of the land-lord, and they afterwards enter into a negotiation for a lease, but differ upon the terms; the land-lord may maintain ejectment to recover possession of the premises, without giving any notice to quit.

It was objected on the part of the defendant, that a notice to quit was necessary under these circumstances.

Lord ELLENBOROUGH.—There is no evidence of any demise to the defendant, or of the relation of landlord and tenant ever having subsisted between him and the lessor of the plaintiff. If this was a tenancy of any sort, it was a tenancy at sufferance, and a notice to quit was unnecessary.

1810.

Deo ex d.
Knight v.
Quigley.

The lessor of the plaintiff had a verdict

Abbott for the lessor of the Plaintiff.

Park for the defendant.

[*Attorneys, Scott & Wegner.*]

Vade Right v. Bawden, 3 East, 260. *Denn v. Rawlins*, 10 East, 261.

Wednesday,
December 9.

REX v. WILLIAMS.

THIS was an indictment for sending a libellous letter, with intent to provoke a challenge.

The letter being sealed up was put by the defendant into a post-office in *Westminster*, addressed to the prosecutor in the city of *London*, by whom it was there received.

Marryat for the defendant contended that in this case there was no evidence of any offence being committed in the county of *Middlesex*, and that it was quite different from the printing of a libel, which might be treated as a misdemeanor either where it was printed, or in any of the places where it was dispersed. This letter had been seen by no one in *Middlesex* but the defendant himself; it could lead to no breach

breach of the peace in this county, and it was criminal merely in relation to the prosecutor, who received it in London.

1810.
Rex
v.
Williams:

Lord ELLENBOROUGH.—There was a sufficient publication in Middlesex, by putting the letter into the post-office there, with intent that should be delivered to the prosecutor elsewhere. Had it never been delivered, the defendant's offence would have been the same. On trials for high treason, intercepted letters are received in evidence as overt acts of treason in the county where they were written.*

The defendant was convicted.

The *Attorney-General* and *Richardson* for the prosecution.

Marryat, and *Fitzgerald* for the defendant.

[*Attorneys, Seymour and Robinson.*]

. *Vide* Ld. Preston's Case, 4 St. Tr. 409. *Gregg's Case*, Post. 218. *Rex v. Stone*, 6 T. R. 527.

Thursday,
December 6.

On an indictment for perjury in an answer to a bill in Chancery, it is sufficient evidence of the defendant having sworn to the truth of the answer, to prove his signature to it, and the signature of the Master in Chancery before whom it purports to be sworn.

Rex v. Wm. Brinson.

THIS was an indictment for perjury in an answer to a bill in chancery.

The answer purported to be sworn before *James Stanley*, Esquire, a master in Chancery. The Clerk who produced it, and proved the hand-writing of *Master Stanley* said, he had no recollection of the oath being administered to the defendant; that the jurat was not in his hand-writing; but that unless on very particular occasions, he is always present when answers are sworn, and that he had very little doubt that he did administer the oath to the defendant before *Master Stanley* in the present instance. The defendant's hand-writing was also proved; but it appeared that the answer is always signed by the person who is to swear to it before the oath is administered.

The *Attorney General* maintained, that the person who wrote the jurat should be called, and that the proof of the oath was insufficient. The defendant's signature was of no consequence whatever, being at all events fixed before the answer was sworn; and nothing remained but a presumption arising from the handwriting of the *Master*, which could not fix the defendant in a criminal case.

Lord

Lord ELLENBOROUGH.—I must give credit to the attestation of the *Master*. The oath appears to have been administered according to the regular course of office. The defendant's signature proves that he was the person who exhibited the answer, and I must take the signature of the *Master* for proof that the person who did exhibit it was regularly sworn to the truth of its contents. If evidence of this sort were not sufficient, it would be impossible to prove any judicial proceedings (*a*).

1810.

Rex
v.
BLSON.

The indictment stated that a bill was filed in the High Court of Chancery, by one *Tompkins*, "against the said *William Benson and another*." In fact the bill was filed against *Benson*, one *Davies*, and His Majesty's Attorney-General. *Benson* had been a dealer in malt, and had become bankrupt. At that time he owed certain duties to government. An extent was accordingly issued, under which all his property was swept away. *Tompkins*, one of his creditors, filed this bill against him, *Davies*, his assignee, and the Attorney-general, alleging that the bankrupt before his bankruptcy had lodged the title deeds of certain estates, for the purpose of preparing a mortgage, with *Tompkins*; who, therefore, had an equity against the crown as well as the other creditors. In that part of the answer on which the perjury was assigned, the defendant swore that he did

In an indictment for perjury in an answer to a bill in Chancery, the Bill was stated to have been filed by A against B (the now defendant) and another. In fact it was filed against B C and D, but the perjury was assigned on a part of the answer which was material between A and B — This held not to be a fatal variance.

(*a*) *Vide Rex v. Morris*, Bul. N. P. 239.

1810.

Rex

v.

BENSON.

not so deliver the deeds at the request of *Tompkins*, or for the purpose of preparing a mortgage, but to convince him that he had property, and for no other purpose whatsoever.

The *Attorney General*, contended that the suit in chancery was misdescribed. His Majesty's Attorney-general was a most material party to it, and ought to have been named as one of the defendants.

Lord ELLENBOROUGH.—In point of fact the bill was filed against *Benson and another*, although there was still a third defendant. The question was material, as between *Tompkins* and *Benson*, and it would have been quite enough to have stated that the Bill was filed against the latter. I do not think it any material variance that the bill is alleged to have been filed against him and another. The statute rendering it sufficient to set out such proceedings according to their substance and effect (*a*), would be entirely defeated if these subtleties were to prevail. I am of opinion that the indictment in this respect is well proved.

The defendant was acquitted on the merits.

Park and Abbott for the plaintiff.

The *Attorney-General* and *Dampier*, for the defendant.

[*Attorneys, Pearson and Blake.*]

(*a*) 23 Geo. 2. c. 11. § 1.

De Bosr

Du Bost v. BERESFORD.

Tuesday,
Dec. 6.

TRESPASS for cutting and destroying a picture of great value, which the plaintiff had publicly exhibited; *per quod* he had not only lost the picture, but the profits he would have derived from the exhibition.

Plea, *not guilty.*

It appeared that the plaintiff is an artist of considerable eminence, but that the picture in question, entitled *La Belle et la Bête*, or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in Pall-Mall for money, and great crowds went daily to see it, till the defendant one morning cut it in pieces. Some of the witnesses estimated it at several hundred pounds.

The plaintiff's counsel insisted on the one hand, that he was entitled to the full value of the picture, together with compensation for the loss of the exhibition; while it was contended on the other, that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

Lord ELLENBOROUGH. The only plea upon the record being the general issue of *not guilty*, it is unnecessary to consider, whether the destruction of this picture might or might not have been justified. The material question is, as to the value to be set upon the

1810.

Du Bost
v.
Berliford.

article destroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord CHANCELLOR, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The Jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Verdict for the plaintiff. Damages £1.

In the course of the trial, Lord ELLENBOROUGH held upon argument, that the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to shew that the figures pourtrayed were meant to represent the defendant's sister and brother-in-law.

Jekyll, Marryat, and Gaselee, for the plaintiff.

The Attorney-General, Park, and Brougham, for the defendant.

[*Attorneys, Pitcher and Lowndes.*]

Vide Fores v. Jones, 4 Esp. recover the value of obscene or
N. P. Cas. 97. in which it was libellous prints sold by the Plaintiff.
held by LAWRENCE J. that an action cannot be maintained to the Defendant.

REX v. GARDNER.

Friday,
December 7.

THIS was an action against the major-commandant of the 2d battalion of *Carmaerthen Volunteers*, for charging and receiving pay from government for a greater number of men than had mustered in his corps within certain periods mentioned in his returns to the war-office.

To prove that he was commandant of this corps as averred in the information, the counsel for the crown at first put in the *London Gazette*, in which his appointment was officially notified.

Scarlett for the defendant objected that this was insufficient, and that they were bound to prove the appointment, either by producing the defendant's commission signed by the King, or by shewing that notice had been given to the defendant to produce it, and then offering secondary evidence of its contents.

Lord ELLENBOROUGH. I cannot think the Gazette is evidence for the purpose for which it is adduced; but it will be enough to prove that the defendant has acted as Major-Commandant of this corps, without adducing direct evidence of his appointment by the King.

The fact of his having acted in this capacity appeared from the returns themselves, in which he described

The London Gazette is not evidence of the military appointments therein notified; but at the trial of an information against an officer in the army for false musters, it is sufficient to prove that he acted in the character mentioned in the information, without proving his commission from the King.

1810.

scribed himself as Major-Commandant of the corps; and the case being fully substantiated in other respects, he was found guilty.

Rex
v.
GARDNER.

The *Attorney-General, Park, Abbott, and Richardson for the Crown.*

Scarlett and Adolphus for the defendant.

[*Attorneys, Litchfield and Hodgson.*]

Vide Rex v. Holt, 5 T. R. 436.

ADJOURNED

ADJOURNED Sittings in London.

EVERETT v. COLLINS.

Monday,
December 19.

MONEY had and received, to recover the sum of 170*l.*

The plaintiff had employed the defendant, who is a salesman in Smithfield market, to sell some cattle for him, and on the 15th of June last his son went to receive the money. The defendant carried the young man with him to *Mingay, Nott and Co.* who acted as book-keepers and sub-agents for him and a number of other salesmen, and desired them to make out the plaintiff's account. The account shewed that the sum of 171*l. 5s. 6d.* was due to the plaintiff. *Mingay, Nott and Co.* then offered to pay the plaintiff's son in Bank of England notes, but he said a cheque would suit him better for the 170*l.* Accordingly they paid him 1*l. 5s. 6d.* in cash, and gave him a cheque for 170*l.* upon *Smith, Payne, and Smith*, bankers in the city. The cheque was cashed immediately to the bankers and dishonoured. Various other cheques of *Mingay, Nott and Co.* were dishonoured the same day, as they had greatly overdrawn their account; but they continued to pay at their inter till four o'clock, when

If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter; this does not discharge the debtor, if the cheque is dishonoured; although the agent fails with a balance of his property at the hands of a larger amount.

they

1810.

they finally stopped, with a balance of the defendant's in their hands, larger than the sum in question.

EVERETT
v.
COLLINS.

Park contended, that the loss ought to fall upon the plaintiff, as he had had an offer to be paid in Bank of England notes, and by his refusing that offer, the defendant had lost the 170*l.* in the hands of *Mingay, Nott and Co.* The plaintiff for his own accommodation prefers the credit of these persons to ready money, and he must therefore stand to the risk of the security he chose to take.

Lord ELLINBOROUGH.—In the ordinary case, if a creditor prefers a bill of exchange accepted by a stranger to ready money from his debtor, he must abide the hazard of the security he takes. But *Mingay, Nott and Co.* are not to be considered in the light of third persons, but as the defendant's servants. When they offered to pay by notes or *their* cheque, that was tantamount to an offer to pay by notes or *his* cheque. The cheque must be looked upon as his; and there is no pretence for saying that a debtor is discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered.

Verdict for the plaintiff.

The *Common Serjeant* and *Gurney* for the plaintiff.

Park and *Lawes* for the defendant.

[*Attorneys, Ellinborough and Edw.*]

So where the defendant had contracted to pay the plaintiff for carrying a cargo of pilchards to Ancona, and the plaintiff had taken a bill for the amount from the defendant's agent there, which was afterwards dishonoured, it was held that this was no payment to discharge the de-

fendant, though his agent at the time owed him more money than the amount of the bill.—
Tapley v. Martens, 8 T. R. 451.
Vide etiam Bolton v. Richard
6 T. R. 139. 1 Esp. N. P. C.
106, and Brown v. Kewley,
2 Bos. Pul. 518.

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EVERITT
v.
COLLINS.

FRAZER v. MARSH.

Monday,
December 10.

THIS was an action for provisions and stores supplied to the ship *Prince of Wales*, in October, 1808.

In June 1805, this ship was taken in execution by the sheriff of Essex, under a s. i. fa. against one *Hearne*, the registered owner, and sold to the defendant; but the legal title was not formally transferred to him till the beginning of the present year. He took possession of her after the purchase; and on the 4th of February 1806, he entered into an agreement with *Walker*, the captain, to let him the ship for three years, to be used and employed by him as he should think proper, at the rent of 100*l.* a year. The defendant interfered no more in the management of the ship, and the provisions and stores in question were ordered by an agent of *Walker*, the captain, while he was in possession of her under the agreement.

The defendant purchased a ship taken in execu-
tion under a s. i. fa. in the year
1805; but the legal title was
not regularly transferred to
him till 1810. In 1806 he en-
tered into an agreement with
the captain to let
him the ship for
three years at a
certain yearly
rent, and in no
way interfered
with the manage-
ment of the ship
afterwards.
Held, that the
defendant was
not liable for
stores supplied to
the ship during
the three years,
by order of an
agent of the
captain.

Lord

1810.

FRAZER.
J.
MARSH

Lord ELLENBOROUGH was of opinion, that under these circumstances the action could not be maintained. The defendant was not documentary owner when the provisions and stores were supplied ; during the three years for which the ship was let, the relation of principal and agent did not subsist between him and the captain, and the credit must be taken to have been given to *Walker* only.

Plaintiff nonsuited.

In the ensuing term an application was made for a new trial ; but the Court refused a rule to shew cause, being of opinion, that the relation of owner and master did not subsist between the defendant and Walker when the stores were supplied ; that Walker was in no sense the defendant's servant, and could have no authority from him to order the stores ; and that the case of a ship being hired for a definite period, is different from the chartering her for a voyage, where the master is always appointed by the owner.

Park and Richardson for the plaintiff.

Scarlett for the Defendant.

[*Attorneys, Willis and Palmer.*]

The cases upon this subject will be found somewhat contradictory. *Vide* *Parish v. Jones*, 3 Esp. N. P. Cas. 27. *v. Crawford*, Stra. 1251. *Val-* *Iejo v. Wheeler*, Cowp. 143. *Rich v. Coe*, Cowp. 636. *James*

WILLIAMS.

WILLIAMS v. SILLS.

Tuesday, De-
cember 11.**C**OVENANT for not keeping premises in repair.

Pleas, 1. Performance. 2. a Licence.

For the purpose of shewing the words of the covenant more fully than they were stated in the declaration, the plaintiff's counsel put in the deed, which they contended they had right to read without proving it by the subscribing witness, there being no plea of *non est factum*.

If the plaintiff declares upon a deed, and there is no plea of *non est factum*; still if at the trial he would read any part of the deed which is not upon the record, he must prove it by the attesting witness in the usual way.

Lord ELLNBOROUGH. The defendant by refraining from the plea of *non est factum*, has only admitted so much of the deed as is expanded upon the record; and if the plaintiff would avail himself of any other part of the deed, he must prove it by the attesting witness in the common way. I know not at present that the instrument produced was ever executed by the defendant, although it partly agrees with that which the plaintiff had declared upon.

The plaintiff had a verdict.

Park and Read for the plaintiff.**Gaselee** for the defendant.

[Attorneys, Rawlinson and Foulkes.]

Vide Hodgkinson v. Marsden, ante 121.

* Tuesday, December 11.

In an indenture of lease with a clause of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; and it is further stipulated by an independent covenant, that the tenant within three months from notice being served upon him by the landlord shall repair all defects specified in the notice. The landlord after serving him with a notice, may within the three months bring an ejectment against him for a breach of the general covenant to repair.

ROE ex. d. GOATLY v. PAINE.

EJECTMENT for a house in *Fetter Lane* on the forfeiture of a lease. The demise was laid on the 2d of October last.

By indenture bearing date 28th August 1809, *Goatly*, let the premises to *Paine* for twenty-one Years, and *Paine* covenanted to keep them in repair during the term: it was likewise provided, "that it should be lawful for *Goatly*, and his surveyor, "with workmen, twice in every year during the "said term at seasonable times to enter the said "premises to view the defects, and of all defects "there found to leave notice at the said premises for "the amendment thereof, and that *Paine* should, "within three months after such notice, repair all "such defects of which such notice should have "been given." The indenture contained the usual clause of re-entry.

It was proved that the premises were out of repair on the day of the demise. The defence was rested upon the effect of a notice, in the following form, which had been sent by the lessor of the plaintiff to the defendant on the 10th of September preceding.

"In pursuance of a certain indenture of lease bearing date 28th August 1809, made, &c. I do hereby give notice and require you forthwith at your own proper costs and charges, to put the premises demised by the said indenture of lease, and every

" part thereof into good and substantial repair,
" agreeable to the covenant on your part and behalf
" contained in the said indenture of lease."

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Goatley
v.
Paine.

It was contended, that the lessor of the plaintiff having given this notice, could not bring his ejectment till three months had expired.

Lord Ellenborough.—The indenture contains a general covenant to keep the premises in repair. By breach of this, the lease was forfeited, and the notice was no waiver of the forfeiture.

The lessor of the plaintiff had a verdict.

Park and —— for the lessor of the plaintiff.

Gurney for the defendant.

[*Attorneys, Jones, and Trewibb.*]

INGRAM v. LEA.

Friday, December 11.

THIS was an action against a carpet-manufacturer, for not delivering a quantity of carpeting which he had made for the plaintiff.

In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties, may

be read in evidence without a stamp.

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INGRAM
v.
LEA.

It appeared that when the plaintiff went to order the carpeting he wrote down upon a slip of paper left with the defendant a memorandum in the following form:

“ 8 Pieces, body black and crimson, 243.

“ 4 Ditto, border ditto, half yard wide.

“ John Ingram.

“ 29, City Road, 13th October 1808.”

Park for the defendant, objected to this paper being read, as it had no stamp. The contract must be considered executory, or it was void under the statute of frauds, there being no memorandum in writing signed by the party to be charged (*a*). But if the goods were not then made, the agreement did not come within the exception of the stamp act with respect to goods, wares, and merchandizes, and could not be received in evidence without a stamp (*b*).

Marryat, contra, contended that this paper was not an agreement, but a mere order. It was not signed by the parties; it fixed no price for the goods; and it contained no stipulation as to when or how they should be delivered. It was merely offered to shew that such goods were ordered by the plaintiff from the defendant, and other evidence would prove

(*a*) 29 Car. 2. c. 3. s. 17. *Towers v. Osborne*, *Strd.* 506.

(*b*) *Buxton v. Bedal*, 3 East, 303. *Waddington v. Bustow*, 2 Bos. and Pul. 452.

that

that the defendant accepted the order, and made the goods for the plaintiff; but that upon a rise of prices he refused to deliver them.

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Ingrain
v.
Levi.

Lord ELLENBOROUGH was of opinion the paper was evidence without a stamp,—and

The plaintiff had a verdict.

Marryat and *Bolland* for the plaintiff.

Park and *Lawes* for the defendant.

[Attorneys, *Luddon* and *Cannons*.]



BASSETT v. COLLIS.

Friday, December
ber 14.

THIS was an action on the warranty of a horse.

It was proved, that the horse being put to hard work a few days after he was purchased, he turned out to be a *roarer*; and a question arose, whether *roaring* constitutes *unsoundness*?

Roaring is not unsoundness in a horse, unless it proceed from some disease or organic defect.

Lord ELLENBOROUGH.—It has been held by very high authority (*a*), that *roaring* is not necessarily *unsoundness*; and I entirely concur in that opinion. If

(*a*) Sir James Mansfield, C. J.

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the horse emits a loud noise, which is offensive to the ear, merely from a bad habit which he has contracted, or from any cause which does not interfere with his general health or muscular powers, he is still to be considered a sound horse. On the other hand, if the roaring proceeds from any disease or organic infirmity which renders him incapable of performing the usual functions of a horse, then it does constitute unsoundness. The plaintiff has not done enough in shewing that this horse was a roarer. To prove a breach of the warranty, he must go on to shew that the roaring was symptomatic of disease.

The defendant had a verdict.

Marryat and Campbell for the plaintiff.

Park and Lawes for the defendant.

[Attorneys, Empson and Tucker.]

Q. as to thrushes, splints, and quidding? There have been several trials lately in which it was debated whether these constitute unsoundness; but the opinions of the farriers and veterinary surgeons examined were so contradictory, that it was impossible for the court to lay down any general rule upon the subject.* *Vide Garment v. Barrs, 2 Esp. N. P. C. 673.*

BATCHELLOR and another v. SALMON.

Saturday,
December 13,

THIS was an action on a written indemnity given by the defendant to the plaintiffs, under the following circumstances :

There had been a levy upon the goods of one *Harris*, at the suit of one *Breakspeare*, for whom the plaintiffs were attorneys. A doubt arising whether *Harris* had not committed an act of bankruptcy before the execution, the sheriff would not pay over the money levied without an indemnity. In consideration that the plaintiffs would indemnify the sheriff, the defendant then undertook to indemnify them.— The money was accordingly paid over to *Breakspeare*; but an action of *rever* was afterwards brought against the sheriff by *Harris's* assignees, and the present plaintiffs were obliged to pay the amount of the sum levied, together with costs.

A writ directed generally to the sheriff could only be described in pleadings as addressed to the individual who was in office when the writ issued.

The declaration stated, that *Breakspeare* sued out “a certain writ of our Lord the King, called a *fieri facias*, directed to Christopher Smith, Esquire, and Sir Richard Phillips, Knight, sheriff of Middlesex.”

The writ produced was a *fi. fa.* in the common form, addressed to the sheriff of *Middlesex* generally.

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LOR
and another
v.
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Park objected that this was a variance; but Lord ELLENBOROUGH held, that as *Christopher Smith* and Sir *Richard Phillips* were in reality sheriff of Middlesex at the time, the writ might be alleged to have been directed to them by name.

An action brought to recover a particular sum of money, may be described in pleading "as an action for the recovering of the said sum of money," although in form it was an action of *trover*.

The declaration afterwards went on to state, that in Michaelmas term, in the 48th year, &c. a certain action was prosecuted at Westminster, by certain persons against the said *Christopher Smith and Sir Richard Phillips*, as such sheriff as aforesaid, for the recovery of the said sum of money so paid as aforesaid (viz. the money levied upon the goods of Harris, the bankrupt.)

The evidence was, that an action of *trover* had been brought by Harris's assignees for converting the goods.

Park contended that the action described in the declaration was an action for *money had and received*; and that the real action being *trover*, this was a fatal variance.

Lord ELLENBOROUGH.—An action of *trover* was brought "for the recovery of the said sum of money so paid as aforesaid." The recovery of the money is stated in the declaration as the object of the action, and the means employed was an action of *trover*.—There is here no incongruity.

The plaintiff's had a verdict.

In

In the ensuing term *Park* moved for a new trial on account of a misdirection on both these points : but the court thought there was no variance, and refused a rule to shew cause.

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and another

v.

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Jekyll and *Fuller* for the plaintiff.

Park for the defendant.

BARCLAY v. BAILEY.

Monday,
Dec. 17.

CTION against the drawer of a bill of exchange accepted by one *David Hardy*.

The presentation of a bill of exchange for payment at the house of a merchant residing in London, at 5 o'clock in the evening of the day it becomes due, is sufficient to charge the drawer.

At eight in the evening of the day the bill became due, it was presented at the house mentioned on the face of it as the drawee's place of residence, when the answer given by a person who came to the door was, that Mr. *Hardy had become bankrupt, and removed into another quarter of the town.* — On the part of the defendant, it was proved that he had a person stationed at this house for the purpose of taking up the bill, from nine in the morning till four in the afternoon, but that no one presented it during that time ; and the point was strenuously argued, that a presentation so late as eight in the evening was insufficient to charge the drawer.

1810. Lord ELLENBOROUGH.—I think this presentment sufficient. A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill.

The plaintiff had a verdict.

Park and Littledale for the plaintiff.

Topping and Williams for the defendant.

[Attorneys, *Cooper and Ellis.*]

If a bill is accepted payable in London after 6 o'clock in the evening, has been held to be too late, and insufficient to charge the drawer. *Parker v. Gordon,* where the banker resides. *Prie-* 7 East, 385.
sentment of a bill at a banker's

BURGON v. SHARPE and others.

Monday,
Dec. 17.

THIS was an action for freight and demurrage, on a memorandum for a charter—in a voyage from *London* to *Buenos Ayres* and back.

When the ship arrived in the river *Plata*, it was found that *Buenos Ayres* had been recaptured by the Spaniards, and she went to *Monte Video*. There her outward cargo was unloaded and accepted by *G. Dyson*, one of the defendants, who was upon the spot, and desired she might wait a certain number of days for a return cargo, which finally could not be procured for her. The plaintiff contended, that *Monte Video* had, under these circumstances, been substituted for *Buenos Ayres*, and that the defendants were liable in the same manner as if the agreement had on his part been performed as it stood in the written memorandum.

Lord ELLENBOROUGH.—Who represented *Burgon* in this substitution?

The plaintiff's counsel contended, that the captain had sufficient authority for that purpose.

Lord ELLENBOROUGH.—The captain was captain for the voyage originally agreed upon, and on which the vessel sailed from *England*. Every thing out of that

The captain of a ship has no authority as such, to agree to the substitution of another voyage in the place of or instead upon between his owners and the freighters of the ship in *England*, and on which he has sailed to a foreign country.

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and others.

that voyage was beyond the scope of his authority as captain. As such he had no power to change that voyage for another. The person who is intrusted with the command of a ship may be vested with a complete controul as to her employment and destination ; but this is superinduced upon his authority as captain ; and to shew that the captain in this case could do away the contract entered into by the owner and conclude a fresh contract binding on both parties, you must go farther than merely proving that he was captain of the ship.

The cause was afterwards referred.

Park, Marryat and Richardson for the plaintiff.

The Attorney-General and Topping for the defendant.

[*Attorneys, Sudlow and Lamb.*]

Tuesday,
Dec. 18.

HODGSON v. DAVIES.

If goods in the city of London are sold by a broker, to be paid by a bill of exchange, the vendor has a right, within a reasonable time if he is not satisfied with the sufficiency of the purchaser, to annul the contract.

THIS was an action for not delivering tobacco sold by the defendant to the plaintiff, through the medium of a broker,—20 hogsheads of which were to be paid *by bill at two months*, and the remaining 20 *by bill at four months*, adding two months interest.

He was not satisfied with the sufficiency of the purchaser, to annul the contract. But the vendor must intimate his dissent as soon as he has had an opportunity to inquire into the solvency of the purchaser.—Five days, considered too long a period for this purpose.

The

The defence principally relied upon was, that the defendant had not ratified the contract entered into by the broker. On the 7th of July 1808, the broker having the usual authority from both parties wrote out the bought and sold note, and sent a copy to each of them. The defendant made no objection till five days after, when he was called upon to deliver the tobacco. He then said he did not approve of the sufficiency of the plaintiff, and refused to perform the contract.

The counsel for the defendant contended, that the person who sells goods by a broker, reserves to himself the power of ratifying or rejecting the contract, as he shall be satisfied with the credit of the purchaser ;—and offered to prove that such is the usage of trade in the city of London.

Lord ELLENBOROUGH was at first rather inclined to think, that the contract concluded by the broker must be absolute, unless his authority was limited by writing, of which the purchaser had notice. But,—

The gentlemen of the special jury said, that unless the name of the purchaser had been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract.

Lord ELLENBOROUGH allowed that this usage was reasonable and valid. But he clearly thought that the

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rejection must be intimated as soon as the seller has had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigency of commerce would permit.— However, he left it to the jury to say, whether it was according to usual commercial practice, to reject a contract so long after it had been entered into.

The jury, without any hesitation, found for the plaintiff.

If it is stated generally in a bill of lading, that the goods are to be paid "by bill," evidence cannot be received to shew, that by bill is meant an *approved bill*; and sensible, that an *approved bill* is a bill to which there is no reasonable objection, and that ought to be approved.

The plaintiff proved that he had tendered his own acceptances in payment of the tobacco.

Park at first offered to call witnesses to prove, that *by bill* is meant an *approved bill*, and that the seller is not bound to deliver the goods unless he approves of the bill offered in payment by the purchaser.

Lord ELLENBOROUGH.—I cannot receive this evidence. The contract must speak for itself. Even if the phrase *approved bill* were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which ought to be approved. To allow the seller in an arbitrary manner to repudiate the bill, would be to enable him, according to his interest or caprice, to annul a contract by which the purchaser is absolutely bound.

The *Attorney General*, *Marryatt*, and *Gurney*, for the plaintiff.

Park

Park and Abbott for the defendant.

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[Attorneys, *Crowder and Legatt*]

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Although the power of a *broker* is thus limited, a *factor* seems in all cases to be authorised to make an absolute sale of the goods of his principal upon credit. *dit.* Willes 406. 3 Bos. & Pul. 489. But a stock-broker can in no case sell stock on credit, without a special authority. 1 Camp. 258.

DE GRAVES v. SMITH.

Wednesday,
Dec. 19.

THIS was an action for a false and deceitful representation of the credit and circumstances of one *W. Rye*, whereby the plaintiff had been induced to trust him, and had lost a large sum of money.

The plaintiff is a wholesale linen draper. The defendant and *Rye* were in partnership as retail linen drapers, but had separated shortly before the representation in question. On the 7th of December 1808, *Rye* wished to purchase goods from the plaintiff to the value of 42*l.* and referred him to the defendant as to his credit. The plaintiff accordingly interrogated the defendant upon the subject,

If *A* inquires generally of *B* concerning the circumstances of *C*, *A* cannot maintain an action against *B*, for a deceitful representation upon this subject, if *C* pays *A* for the goods which it was in contemplation to sell when the representation was made, although *C* becomes insolvent, and is indebted to *A* for other goods subsequently sold. — After, if *A* had enquired of *B* whether *C* was

worthy to be trusted as a general customer, or if there had been any conspiracy between *B* and *C* to cheat *A* by paying for the first parcel of goods.

without

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without mentioning the quantity of goods then to be sold to *Rye*, or any particular mode of dealing to be established between them. The defendant said, “*Rye* had once in the concern, near 7000*l.* I should still lend him 1,500*l.* on his own security ; and I consider him a very honest man, and trust worthy.”

The plaintiff accordingly let *Rye* have the goods, and went on dealing with him till the 12th of August 1809, having furnished him with goods during that time to the value of 347*l.* 10*s.* 5*d.* *Rye* paid for the first two parcels which he had, but at the close of the account he owed 242*l.* He then became insolvent ; and it appeared that, within the defendant’s knowledge, his affairs were in an embarrassed state at the time of the representation.

Park, for the defendant, contended, that under these circumstances the action could not be maintained. The loss of which the plaintiff complained had not arisen from the defendant’s representation, but from the plaintiff’s own negligence : for the goods furnished on the faith of the representation, the plaintiff had been regularly paid. If he was to go on dealing with *Rye*, he should have made fresh inquiries concerning his solvency. Omitting to do so, he acted upon his own opinion. A representation of this sort never could be allowed to operate as a perpetual garantie.

Topping, contra, relied upon *Hutchinson v. Bell*, 1 *Taunt.* 558, in which it was held, that if *A* make an inquiry of *B* as to the circumstances of *C* with respect

respect to opening an account with him as a general customer, and *B* fraudulently misrepresents them, in consequence of which *A* sells *C* goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcel of goods, on the purchase of which the reference was made. HEATH J. there remarked, that if the action could be at all maintained, it would be very inconvenient to limit it to the goods first supplied; for he had seen many instances of conspiracy to defraud tradesmen, in which the goods first delivered were always punctually paid for; and MANSFIELD C. J. declared that he thought it reasonable to make the defendant answerable for the credit given to the third person on the faith of his representation, provided it was not carried to an unreasonable extent, and was confined to a reasonable time.—Here the credit given by the plaintiff to *Rye* was reasonable both as to time and extent, and was a direct consequence of the representation. That being false and deceitful, the defendant ought therefore, to make good the loss which had thereby arisen to the plaintiff.

Lord ELLENBOROUGH. In the case in the Common Pleas, the plaintiff had stated to the defendant, that Young, the third person, was about to open an account with him as a general customer. On that ground the defendant might be liable for any loss which arose to the plaintiff from subsequent dealings, within a reasonable time. But to say that in ordinary cases of this sort, the person who gives a representation

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representation of the credit of a third person, shall be liable for other parcels of goods afterwards furnished to him, would be to make the representation a continuing guarantie, and to repeal the statute of frauds. When cases appear of a conspiracy to cheat a tradesman by means of paying him for one parcel of goods, they will be determined by their own peculiar circumstances. Nothing of that kind has been proved here. The observations of the learned judges in *Hutchinson v. Bell*, must be confined to the case then in judgment before them. The plaintiff having been paid for two parcels of goods furnished after the representation, has failed to shew that he has sustained any loss by reason of the defendant's deceit, and must therefore be

"

Nonsuited.

Topping and *Gleed* for the plaintiff.

Park and *Lawes* for the defendant.

[Attorneys, *Foulkes* and *Tucker*.]

RICKFORD and others v. RIDGE.

MONEY had and received to recover back a sum of 300*l.* paid by the plaintiffs to the defendant under the following circumstances.

Thursday,
December 20.

A Banker in London who receives a cheque by the general post, is not bound to present it for payment till the following day.

The plaintiffs are bankers at *Aylesbury* in the county of *Buckingham*. At noon on the 13th day of June last, the defendant asked them to cash for him a cheque, dated on the 11th of the same month, drawn by *Mingay, Nott & Co.* salesmen in *Smithfield*, on *Smith, Payne & Co.* bankers in the city of *London*. The plaintiffs gave him country notes for the amount, which were duly paid. The post leaves *Aylesbury* at six in the evening. The plaintiffs did not send off the cheque by the post of the 13th, but by a coach which started at eight o'clock in the morning of the 14th. It was directed to *Praed & Co.* bankers in *Fleet Street*, the plaintiffs' agents in town, who received it between three and four in the afternoon of the same day. They presented it for payment about 11 in the forenoon of the 15th, when the answer was, "No effects — must see the drawers." *Mingay, Nott and Co.* paid at their own counter till four on the 15th; but no application was made to them to pay this cheque. Notice of its dishonour was given to the defendant on the 16th. The clerks of *Praed and Co.* stated, that had the cheque arrived by post on the forenoon of the 14th, they should not have presented it before the 15th. They send out cheques

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and bills for payment only once a day ; and as this is generally before letters by the post are delivered, cheques and bills contained in such letters remain with them till the following morning. Clerks from other bankers in Fleet Street, swore that this is according to the manner in which they carry on business in that part of the town.

A Gentleman of the special jury observed (and it was on both sides allowed to be so) that the practice is different with all London bankers east of *St. Paul's*, who present for payment all cheques and bills the very same day they receive them by the post.

The *Attorney General*, for the plaintiffs, insisted that they were not bound to send off this cheque to London sooner than by the post of the 14th, the day after they received it. The transmitting of a cheque from the country, he compared to giving notice of the dishonour of a bill of exchange. For both purposes the party has a day, without reference to the exact hour when he himself receives the cheque or the notice. But even supposing that the plaintiffs should regularly have sent the cheque by post on the 13th, if they meant to make use of that conveyance, still all due diligence had been used with respect to the cheque, as it was presented for payment as soon as it would otherwise have been by the usage of the bankers in Fleet Street, which must be considered reasonable and consistent with the law of merchants.

Park for the defendant, denied that the plaintiffs were

were at liberty to keep the cheque at *Aylesbury* till six in the evening of the 14th, when they could, without the slightest difficulty or inconvenience, have dispatched it the same hour the day before; and he contended, that if *Fraed & Co.* had received the cheque by post on the 14th, they would have been bound to have presented it for payment the same day, as much as if they lived in the heart of the city. He likewise objected that the cheque had not been carried to *Mingay, Nott & Co.* on the 15th, according to the answer given at *Smith, Paine & Co.'s*, as in that case it would no doubt have been paid.

Lord ELLENBOROUGH.—The holder of a cheque is not bound to give notice of its dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those only against whom he seeks his remedy. The question here is, whether if the cheque had arrived by post on the 14th, the bankers were bound to present it for payment the same day? This must be decided by the law-merchant. I can not hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's and another for the westward. They may as well fix upon St. Peter's at Rome. It is always to be considered, whether under the circumstances of the case the cheque has been presented with reasonable diligence. This is what the law-merchant requires. The rule that the moment a cheque is received by the post, it

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should invariably be sent out for payment, would be most inconvenient and unreasonable. In *Liverpool*, and other great towns, different posts arrive at different hours; but it would be impossible to have clerks constantly ready to carry out all the bills and cheques that may arrive in the course of the day; nor if it were possible, is it requisite that all other business being laid aside, parties should devote themselves to the presenting of cheques. The rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable that cheques received in the course of one day should be presented the next. Is this practice consistent with the law-merchant? It cannot alter it. Bankers would be kept in a continual fever if they were obliged to send out a cheque the moment it is paid in. The arrangement mentioned by the plaintiffs' witnesses appears subservient to general convenience, and not contrary to the law-merchant, which merely requires cheques to be presented with reasonable diligence.

The jury, after some deliberation, found a verdict for the plaintiffs.

The *Attorney-General* and *Littledale* for the plaintiffs.

Park and *Marryat* for the defendant.

[*Attorneys, Ross and Bowd.*]

BARING v. VAX.

Friday,
December 21,

THIS was an action on a policy of insurance on the *Dorothea Margaritta* "at and from Rotterdam to London, with leave to touch, unload and receive goods at all or any ports, warranted free from capture in port."

The ship, while lying at anchor in *Ghoree Ghat*, about half an English mile from *Ghoree*, was captured by a French privateer, which had followed her down the *Maes* from *Rotterdam*. The place where she then lay is an open road, but within the head lands which are considered to form the mouth of the river *Maes*.

The *Attorney-General*, for the plaintiff, contended, that this case was decided by *Brown v. Tierney*, 1 *Taunt.* 517, where a ship warranted free from capture or seizure in port, being captured in *Pillaw Roads*, it was held that the underwriters were liable.

Park, contra, observed, that it did not appear that *Pillaw Roads* had any protection from the land, and that that case was therefore inapplicable. Here, the place where the ship lay was in the river *Maes*, and she must be taken to have been *intra præsidia* at the time. A ship must be taken to be in port within the meaning of this warranty, unless she were upon

A warranty in a policy of insurance against capture in port does not protect the underwriters from a loss happening by capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. Therefore where a ship insure^d from Rotterdam to London, and "war-
"anted free
"from capture
"in port," was captured while lying at anchor near Ghoree in the river Maes, the underwriters were held liable.

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the open seas. While in a river or land-locked road, she is exposed to the risks against which the underwriters wish to guard, and which are excepted in the policy. While the ship was lying off *Ghoree* she might have been seized by the Douanniers stationed in that town. In fact she was captured by a privateer that had watched her from *Rotterdam*. She was not in a harbour when taken; but a port and a harbour are quite distinct, and a port frequently includes the mouth of a river or an adjoining roadstead.

Lord ELLENBOROUGH.—If you would protect yourself by the warranty, you must shew that the ship was in some port at the time of the capture.—You have given no such evidence. You must make the place where she lay at anchor *a port*, and no witness has stated that it is within the port of *Rotterdam*, or the port of *Ghoree*, or any other port. The warranty not having specified the port of departure, I think it is not narrowed to *Rotterdam*; but giving you the benefit of all ports, you do not prove the capture to have happened in any port whatsoever. You only shew the spot to be within the head-lands of a river; but this is greatly too loose. The ship might have been captured by a privateer that followed her from *Rotterdam* when she was within sight of the English coast. The warranty seems to guard against land risk. The ship might be seized by a military force while taking in her cargo; and this was the sort of peril against which the underwriters would not insure. But at any rate, they must find the port in which they say this vessel was anchored when the loss took place.

The gentlemen of the special jury said, they were clearly of opinion the ship was not to be considered as in port when she was captured, and immediately found a verdict for the plaintiff.

In the ensuing term, an application was made to the court for a new trial; but the rest of the court agreeing with the CHIEF JUSTICE, a rule to shew cause was refused.

The *Attorney General, Topping and Puller* for the plaintiff.

Park and Taddy for the defendant.

Vide Jarman v. Coape. post.

BELL and others v. CARSTAIRS.

Friday,
December 21.

THIS was an action on a policy of insurance on the ship Eliza, her freight and cargo, at and from Virginia to a market in Holland or Germany, with leave to touch at or off Falmouth for orders.

A representation made to any underwriter except the first on the policy, is not to be considered as made to subsequent underwriters.

The ship was captured in the English channel by a French privateer, and afterwards condemned by the court of prizes at Paris for not having on board a passport in the form required by the treaty between France and the United States of America.

1810. The ship was not described or warranted in the policy to be of any particular nation ; but for the purpose of shewing that the assured were bound by a *representation* that she was *American*, the defendant's counsel proposed to prove that she had been so represented to an underwriter, whose name stood before the defendant's, but was not the first on the policy.

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'Lord ELLENBOROUGH.—This evidence is inadmissible. It is difficult to see on what principle of law a representation to the first underwriter is considered as made to all those who afterwards underwrite the policy. That rule being established, I will abide by it ; but I will by no means allow it to be extended. You must shew the representation to have been made to the first underwriter on the policy, or to the defendant himself. What passed between the broker and the intermediate underwriters, is to be considered merely *res inter alios acta*.

The *Attorney General*, Park and *J. Warren* for the plaintiffs.

Scarlett, Puller and Campbell for the defendant.

[*Attorneys, Blunt and Wadeson.*]

Vide Pawson v. Watson, Cowp. 787. *Stackpool v. Simon*, Park, 582. 6 ed. Marsden v. Reid, 3 East, 572.

BOUSFIELD v. CRESWELL, Executor of WHITFIELD.Saturday,
November 22.

THE defendant's testator was an insurance broker, and had effected a policy for the plaintiff where a total loss had happened. This was an action for his not having duly called upon certain of the underwriters, who have since become insolvent, to settle the loss and pay the sums insured by them.

It appeared that Whitfield had been employed as a broker to get the policy under-written; but there was no evidence to shew that he ought to have called upon the underwriters to settle and pay, except that the policy remained in his hands after the loss had happened.

If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it.

Lord ELLENBOROUGH.—If an insurance broker keeps the policy in his hands, he shall be presumed to promise, that he will collect the sums due from the underwriters upon a loss happening, in consideration of the commission he receives for effecting the insurance. Here, the testator, if he chose to part with his lien, might have handed over the policy to the assured as soon as it was effected, and his responsibility would then have been at an end; but as he retained it, he was bound to use all reasonable diligence to bring the underwriters to a settlement of the loss, according to the usages of trade in this respect.

1810.

There was a verdict for the defendant upon the merits.

BOU-SFIELD
v.
CRESWELL,
Executor of
WHITFIELD.

The *Attorney General, Marryatt, and Gaselee*, for the plaintiff.

Park and Lawes for the defendant.

[*Attorneys, Atcheson and Williams.*]

If an insurance broker living at a distance from his principal, upon a loss happening, gives him credit in account for the money due from the underwriters, he cannot a considerable time after make a demand upon him for the amount of the sums subscribed by several of the underwriters who have become insolvent without paying.

Jameson and another v. Swainstone, C.P. Sittings in M.T. 1809. *Indebitatus assumpsit* to recover a sum of 325*l.* from the defendant, under the following circumstances: The plaintiffs were insurance brokers residing at *Leith* in Scotland, and had, by orders of the defendant, who lived at *Liverpool*, effected for him certain policies of insurance with different underwriters at *Leith* upon the defendant's ship, bound on a voyage from *Liverpool* to the *Baltic*. In the course of the voyage the ship was stranded in

the *Orkneys*, and the plaintiffs advanced considerable sums of money in resitting the ship and preparing her for the remainder of the voyage. Afterwards, an average loss was adjusted of 68 *per cent.* and the plaintiffs, upon that adjustment, in the month of May 1806, transmitted an account from *Leith* to the defendant at *Liverpool*, debiting him with their advances, and giving him in return credit for the amount of the average loss due from the underwriters in *Leith*. The balance of the account so rendered, was in favour of the plaintiffs 17*cl.*, which the defendant immediately paid. In the month of August following, which was the usual time at *Leith*, of settling between the brokers and the underwriters, the plaintiffs called upon the underwriters for the amount of the average loss; some of them paid, others refused upon the ground of

of insolvency. The sum which was not received, amounted to 325*l.* and was the subject of the present action. Different applications were made by the plaintiffs to the underwriters for payment, but without effect. Afterwards, in August 1808, the plaintiffs transmitted another account to the defendant, in which they claimed to be due to themselves this sum of 325*l.* by reason of their not being able to receive it from the underwriters.

The plaintiffs' counsel contended, that as they had received no *del credere* commission from the defendant to guarantee the solvency of the underwriters, and as they had endeavoured to collect what was due from them, they had a right to recover from the defendant that sum for which they had before given him credit, upon the faith that the underwriters would pay it.

On the other hand it was insisted, that the plaintiffs having kept their principal in the dark for two years, with respect to the state of those underwriters who refused to settle the average loss, could not now call upon him for the sum in question: and the defendant undertook to prove

that the usage of trade was against the demand.

MANSFIELD C. J. said, that without resorting to usage, which might be different at *Leith* and *London*, he was of opinion, that after so great a lapse of time between the rendering of the two accounts, the brokers as betwixt themselves and their principal, must be presumed either to have received actual payment of the average loss from all the underwriters, or to have settled with them in account some way or other. For the purpose of recovering from the defendant, they should have apprised him in August 1806, of the state of the underwriters, who, he was naturally led to suppose, had settled with the brokers, and their silence had deprived him for the space of two years of all opportunity of enforcing the policies of assurance. The broker's laches was an answer to their demand against their principal, and they must look to the underwriters, whom they had trusted.—Verdict for the defendant.

Vide Edgar v. Bumpstead
1 Camp. 411.

1810.

BOUSFIELD
v.
CRESWELL,
Executor of
WHITFIELD.

COMMON PLEAS.

FIRST SITTINGS AFTER TERM IN LONDON.

Friday,
November 30.

An action may
be maintained
upon a bond ex-
pressed to be pay-
able to a mer-
cantile firm, by
the persons who
actually consti-
tuted the firm
when the bond
was executed.

J. MOLLER and T. MOLLER v. LAMBERT.

CTION on a bottomry bond, executed in Por-
tugal.' Plea, *non est factum.*

The bond being read, it appeared that the defendant thereby bound himself to the "*Widow Moller and Son.*" It was proved, that the *Widow Moller* had been dead some years before the execution of the bond, and that the plaintiffs, her sons, have since continued to carry on trade under the old firm.

Lens, Serjeant, for the defendant, objected, that however a bill of exchange or promissory note might be given to a mercantile firm,—in such a solemn instrument as a bond, the names of the obligees must be specifically mentioned.

Best,

Best, contra, maintained that in this respect there was no difference between deeds and simple-contract instruments, and that a bond given to "Messrs. Childs" might clearly be sued upon by the members of that house.

1810.
J. MOLLER
and
T. MOLLER
v.
LAMBERT.

SIR JAMES MANSFIELD C. J. thought it was enough if the plaintiffs were proved to be the persons meant by the *Widow Moller and Son*; and—

They had a verdict accordingly.

Best, Serjeant, and Reader for the plaintiffs.

Lens, Serjeant, for the defendant.

CALLAGHAN' v. AYLETT.

THIS was an action on a bill of exchange, drawn by the plaintiff to his own order, upon and accepted by the defendant; payable at *Ramsbottom and Co.'s, Bankers, London*.

The declaration stated, that the defendant accepted the bill, according to the usage and custom of merchants.

If a bill of exchange be accepted payable at a particular place, in an action against the acceptor, the plaintiff must prove that it was presented there for payment when it became due.

The

1810. The plaintiff's counsel proved the defendant's hand-writing as acceptor of the bill, and there rested their case.

**CALLAGHAN
v.
AYLETT.**

Clayton, Serjeant, for the defendant, objected on the authority of *Ambrose v. Hopwood*, 2 *Taunt.* 61. that the plaintiff was bound to prove, that the bill, when it became due, had been presented for payment at Ramsbottom and Co.'s, bankers, were it was made payable.

Marshall, Serjeant, and *E. Lawes*, *contra*, contended, that this was unnecessary in an action against the acceptor.

MANSFIELD, C. J. saved the point; and the plaintiff had a verdict, subject to the opinion of the Court of C. P. as to the necessity of proving that the bill was presented at the bankers for payment.

A rule *nisi* having been obtained in the ensuing term, for setting aside the verdict and entering a non-suit,—

Marshall, Serjeant, shewed cause. He denied the authority of *Ambrose v. Hopwood*, as that was in reality an action against the drawer, and passed without argument. In *Saunderson v. Judge*, 2 *H. Bl.* 509. it was solemnly determined, that if a promissory note be made payable at a particular place, this is a mere memorandum, and no part of the contract. This principle has been invariably acted upon since. In *Lyon v. Sundius*, 1 *Camp.* 423, Lord

ELLENFOROUGH held, that if a bill of exchange be accepted, payable at a banker's, in an action against the acceptor, there is no occasion to allege or prove that it was presented there for payment; and in *Wdd v. Rennards*, 1 Camp. 425 n. BAYLEY, J. again ruled the same way, in an action on a promissory note. At any rate, the Court would not order a nonsuit to be entered; but, at most, would grant a new trial, as the plaintiff might have given evidence of the consideration under the money counts.

Court (*a*). In *Saunderston v. Judge*, the place of payment was a mere memorandum at the foot or on the back of the note. The place where this bill of exchange is made payable, must be considered as part of the contract between the acceptor and the holder. The person on whom a bill is drawn, may accept it generally, or he may accept it specially.—This is a special and qualified acceptance. The defendant undertook, that when the bill became due, it should be paid at *Rambottom & Co.'s*;—not that he should be liable upon it universally. There was no objection, in point of law, to his limiting his responsibility in this manner; and it seems fair, that when a party has provided funds at his banker's, for the due satisfaction of a bill of exchange, he should be allowed to protect himself from the risk of being arrested upon it by a malicious creditor. It appears to have been decided at the Court of King's Bench,

(*a*) HEATH, LAWRENCE, and CHAMBER, Justices; — *absente*
MANSFIELD, C. J.

in

1810.
 CALLAGHAN
 v.
 AYLETT.

1810. in *Parker v. Gerdon* (*a*), that if a bill be accepted, payable at a banker's, it must be presented there for payment, to charge the drawer; and it is impossible to make any distinction for this purpose between the drawer and the acceptor. The rule must therefore be absolute. When the plaintiff confined himself to the count upon the bill, he took the risk of our opinion being against him, and the question reserved for the court was, whether he ought not to have been nonsuited at the trial.

Rule absolute for entering a nonsuit (*b.*)

(*a*) 7 East, 385. There, the only evidence of presentment was at the banker's, after banking hours, and Lord ELLENBOROUGH seems rather to have thought, that if the bill had been presented personally to the acceptor the day it became due, this would have been sufficient.

(*b*) Q. Will the acceptor be discharged if the bill is not presented for payment at the place where it is made payable, the very day it becomes due? If it is duly presented and dishonoured, will the acceptor be entitled to immediate notice of this dishonour, as in the case of the drawer?—Will he be obliged to shew that he has been damaged by the laches of the holder, or will it be incumbent on the holder to prove that he had not funds to satisfy the bill at the place where payment was to be demanded?

N. B. Since the above was printed, the case of *Fenton v. Goudry* has been argued on demurrer in the Court of K. B., and the Judges of this Coort have shewn a strong inclination to overrule the decision of the Court of C. P. in *Callaghan v. Aylett*. The point being of such importance, the judgment of the Court of K. B., if finally pronounced during E. T. 1811, will be mentioned at the end of this volume.

**CALLAGHAN
v.
AYLETT.**

CASES.

ARGUED AND DECIDED AT

N I S I P R I U S

IN K. B.

At the Sittings in and after Hilary Term,

51 GEORGE III.

SECOND SITTINGS IN TERM AT WESTMINSTER.

1811.

COOMBE v. MILES.

Saturday,
February 2.

THIS was an action against the defendant as acceptor of a bill of exchange, drawn by *Plimpton, Goddard & Co.* payable to their own order, and indorsed by them to the plaintiff.—The defence was, that the plaintiff had been guilty of usury in discounting the bill. It appeared, that when *Plimpton*, one of the drawers, requested the plaintiff to discount it, he said he would not do so, except *Plimpton* would take about £70 worth of ready-made

In an action by the indorsee of a bill of exchange, although it appears that the plaintiff, in discounting it, required the indorser to take part in goods; still, if the latter voluntarily acceded to that proposal as advantageous to him, the plaintiff is not bound to the defendant if he would impeach the transaction as usurious.

prove that the goods were of the estimated value, and the burthen of proof lies upon the defendant if he would impeach the transaction as usurious.

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Q o

Plimpton

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COURT
of
MILLS.

waistcoats at a given price. *Plumpton* answered, that he was very ready to take the waistcoats, as he thought he could make a profit of them; and the bill was discounted by the plaintiff accordingly.

Garrow for the defendant, contended, on the authority of *Davis v. Hardacre, ante*, 375, that the plaintiff was bound to shew that the waistcoats were of the value charged, as it appeared that he insisted upon their being taken by a man who did not want ready made waistcoats but cash for his bill.

Lord ELLENBOROUGH.—Where circumstances of strong suspicion appear, I think it is fair to call upon the person who gives goods in discounting a bill of exchange, to shew that they were of the real value at which they were charged. But here, although the proposal to take the waistcoats originated with the plaintiff, the other party readily acceded to it, and said he thought he should make a profit by the transaction. Upon this evidence, therefore, we must rather presume that the goods were charged beneath their true value; and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill on the score of usury.

Verdict for the plaintiff.

Park and Lawes for the plaintiff.

Garrow for the defendant.

[*Attorneys, Hall and Tegg.*]

FIRST

FIRST Sittings AFTER TERM AT WESTMINSTER.

ALEXANDER v. GIBSON.

Wednesday,
February 13.

ACTION on the warranty of a horse.

A witness was called to prove that the horse had been sold to the plaintiff by the defendant's servant at *East Grinstead* fair, in December 1809, and that the servant then warranted the horse to be sound.

Park, for the defendant, insisted, that the plaintiff was bound either to call the servant himself, or to begin by proving that he had authority from his master to warrant the horse.

A servant em-
ployed to sell a
horse and re-
ceive the price,
has an implied
authority to war-
rant the horse to
be sound, and in
an action upon
the warranty, it
is enough to
prove that it
was given by the
servant, without
calling him, or
shewing that he
had any special
authority for
that purpose.

Lord ELLENBOROUGH.—If the servant was au-
thorized to sell the horse, and to receive the stipu-
lated price, I think he was incidently authorised to
give a warranty of soundness. It is now most usual,
on the sale of horses, to require a warranty, and the
agent who is employed to sell, when he warrants
the horse, may fairly be presumed to be acting
within the scope of his authority. This is the com-
mon and usual manner in which the business is
done, and the agent must be taken to be vested with
power to transact the business with which he is in-

1811.

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v.
GIBSON.

trusted, in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty (*a*).

If a witness unexpectedly gives evidence against the party calling him, although his evidence cannot be in part relied upon and the rest of it disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him.

The evidence objected to was accordingly received. However, the servant himself was afterwards voluntarily called by the plaintiff, and swore positively in his examination in chief, that he was expressly forbidden by his master to warrant the horse, and that he had not given any warranty. The plaintiff's counsel, nevertheless, called another witness to prove, that at the time of the sale, the servant declared that "the horse was sound all over."

Park objected that the plaintiff was not now at liberty to contradict his own witness."

Lord ELLENBOROUGH.—If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted.

(*a*) So if a broker is authorized to advertise a ship as a general ship to any particular port, and in his advertisement he warrants that she shall sail with convoy, the owners are bound by this warranty, although in giving it

the broker may have exceeded his authority. *Rinquist v. Dit-chell*, K. B. Sitt. p. M. T. 40 Geo. 3. Cor. Lord KENYON. *Abbott on Shipping*. Part II. c. ii. 8.

In *Lowe v. Joliffe* (*a*), which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed ; but they were contradicted by other evidence, and the will was established. The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated.

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ALEXANDER

v.

GIBSON.

Verdict for the plaintiff.

Garrow and Abbott for the plaintiff.*Park and Marryat* for the defendant.[*Attorneys, Presland and Roberts.*] *

(a) 1 Bl. Rep. 365. *Vide Bishop of Durham v. Beaumont,*
1 Camp. 207.

HAWLEY v. PEACOCK and another.Wednesday,
February 13.

ACTION of the defendants as acceptors of a bill of exchange.

A deed alleged in a plea to be lost by time and accident, may be given in evidence, if having been lost at the time of pleading it is found before trial. In assumpsit, a release may be given in evidence under the general

Plea 1. the general issue; and 2dly, a release lost by time and accident.

1811.

HAWLEY
v.
PEACOCK.

The plaintiff's case being made out—

The defendants offered to give in evidence, a composition deed, with a clause of release, executed by the plaintiff, which had been mislaid at the time of plea pleaded, but had since been found.

Garrow for the plaintiff, contended, that upon this record, the defendants could only give evidence of a release lost by time and accident.

Lord ELLENBOROUGH.—The averment of the loss of the deed relates to the time of plea pleaded, and applies only to the excuse of profert. The issue joined is, whether the plaintiff did execute such a deed as is set out in the plea, whereby this action was released. Therefore, if the deed was lost, and has been found since plea pleaded, I think it may be received in support of the special *plea*.—But it may likewise be given in evidence under the general issue. It has been considered, that a release must be pleaded specially in trover; but in *assumpsit*, the defendant may entitle himself to a verdict upon *non assumpsit*, by giving in evidence, any thing to shew, that the plaintiff had no cause of action.

Verdict for the defendant.

Garrow and *Marryat* for the plaintiff.

Park and *Storks* for the defendant.

[*Attornies, Vincent and Dalton*]

Doe

Doe d. BAKER v. WOOMBWELL.

Wednesday,
February 13th

EJECTMENT for a messuage. The demise was laid on the 1st of November last.

This was a case between landlord and tenant from year to year. The receipts for rent were not produced in pursuance to notice, but it appeared, that rent had been paid on the usual quarter days.

On the 22d of March, a notice was given to quit at the expiration of the current year. No direct evidence was adduced as to when the tenancy commenced. The declaration in ejectment was served on the 16th of January last, when the defendant made no objection to the notice to quit, nor set up any right to the possession of the premises, but said he should go out as soon as he could suit himself with another house.

Marryat, for the defendant, insisted, that there was no evidence to go to the jury, to shew that the tenancy had been determined before the demise.— Unless this were a Michaelmas holding, the ejectment could not be supported, and there was equal reason to suppose, that the tenancy commenced at Christmas, Lady-day, or Midsummer.

Lord ELLENBOROUGH.—I think the defendant's declaration when served with the ejectment, is evidence to go to the jury, that this was a Michaelmas

A notice was given on the 22d of March by landlord to his tenant to quit at the expiration of the current year. A declaration in ejectment laying in the demise on the 1st of November, was on the 16th of January following served upon the tenant who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself. It is held to be *prima facie* evidence, that the tenancy commenced at Michaelmas and was determined before the day of the demise.

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DOE
d.
BAKER
v.
WOMBWELL.

holding. If they believe he merely meant to say, that rather than involve himself in litigation, he would quit possession as soon as he could get another house, although he could not be legally turned out then,--there is nothing to fix the commencement of the tenancy, and he will be entitled to a verdict; but from his making no objection at the time he was served with the ejectment, and giving a qualified promise to leave the premises, he may be understood to have admitted, that the tenancy had been determined by the notice, and that the action was well brought. If the latter construction should be put upon his words, there must be a—

Verdict for the lessor of the plaintiff.

Park and Littledale for the lessor of the plaintiff.

Marryat for the defendant. “

[Attorneys, *Burt and Vincent.*.]

A notice to quit, if not served personally upon the tenant in possession, is no evidence to prove the commencement of the tenancy. *Doe d. Ash v. Calvert ante*, 388. But if the notice to quit be served personally upon the tenant in possession, and he makes no objection to the time

when he is desired to quit, this is *prima facie* evidence that the tenancy commenced at the season of the year when the notice expires. *Thomas d. Jones & Wife v. Reece Thomas, post. Doe d. Charles Bart. v. Foster, K.B. E. T. 51 Geo. 3. 18 East.*

HENDERSON and SMITH v. WILD.

Saturday,
Feb. 16.

THIS was an action for goods sold and delivered.

The plaintiffs had been in partnership as warehousemen, and sold the goods in question to the defendant, on the 6th of April 1809, and the 1st of February 1810. On the 25th of October 1810, they dissolved their partnership, and on the 27th of the same month, published an advertisement in the London Gazette, giving notice of the dissolution, and intimating that all debts due to the partnership, should be paid to *Henderson* only.

On the part of the defendant, two receipts, signed by the plaintiff *Smith*, were put in and proved, one bearing date the 21st March 1810, for the amount of the first parcel of goods; and the other, bearing date the 10th July 1810, for the amount of the last parcel.

Garrow, for the plaintiffs, stated, that no money had passed when these receipts were granted; that the defendant being a tailor, had done business on the separate account of *Smith*, which was attempted to be set off against the goods sold by the partnership; and moreover, that the receipts, although dated

If A and B are in partnership, and C owes them a sum of money on the partnership account, a receipt for this given by A upon setting off a private debt due from himself to C, will be a bar to an action by A and B against C, for the debt due to the partnership; but, if after a dissolution of the partnership between A and B, and a notice in the Gazette that all debts due to the partnership shall be paid to B, A collusively gives C a receipt for the debt, dated anterior to the dissolution of the partnership, the receipt is void, and an action may still be maintained against C for the debt, in the names of A and B.

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HENDERSON
and
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v.
WILDS.

in March and July 1810, had not in fact been given till after the partnership was dissolved, and the advertisement had appeared in the Gazette. But at whatever time the receipts had been given, as no joint consideration passed to the plaintiffs, it was contended that they were no bar to the action.

Lawes, for the defendant, allowed that the receipts had been given upon a set-off of *Smith's* separate debt against the debt jointly due to the partnership. He denied, that in point of fact they had been given at a time subsequent to their respective dates; but whensoever given, he maintained the plaintiffs were estopped by them. There was an acknowledgment of payment under the hand of one of the plaintiffs on the record, who could not pretend that he had signed it ignorantly, or that any fraud or deceit had been practised upon him. *Bauerman v. Radenius*, 7 T.R. 663. and *Alner v. George*, 1 Camp. 392. were cited as in point.

Lord ELLENBOROUGH was of opinion, that if the receipts had been given *bona fide* at the times they bore date, they would have been a bar to the action, though the defendant did not pay the price of the goods for the benefit of both the plaintiffs; but that if they were in reality not given till after the dissolution of partnership, and the advertisement in the *Gazette*, they were to be considered fraudulent and void.

The evidence, which was doubtful, being closed, His Lordship left it to the jury to say, when the receipts had been given.—The jury thought that they had been fabricated after the dissolution and advertisement; and therefore, by His Lordship's direction, found a verdict for the plaintiffs,—which, upon a motion for a new trial in the ensuing term, was approved of and confirmed by the Court of K. B.

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HENDERSON
and
SMITH
v.
WILD.

Garrow and Barrow for the plaintiffs.

Lawes for the defendant.

[Attorneys, *Caton and Wishen*.]

Vide Ridley v. Taylor 13 East, 175.

REX v. FISHER and others.

Saturday,
February 16.

THIS was an indictment against the printer, publisher, and editor of a newspaper called *The Day*, for the publication of a libel upon one *Richard Stevenson*.

The indictment stated, that before the printing and publishing of the scandalous, defamatory and

It is libellous to publish the preliminary examinations taken *ex parte* before a magistrate previous to committing a man for trial or holding him to bail for an offence with which he is charged; the tendency of such a

libel being to prejudice the minds of jurymen against the accused, and to deprive him of a

malicious

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v.
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malicious libel therein afterwards mentioned, to wit on the 8th day of October, in the 50th year, &c. one Mary Popplewell preferred to and before the Right Honourable Thomas Smith, then and still continuing to be Mayor of the City of London and one of the keepers of the peace and justices of our said Lord the King assigned to keep the peace and also to hear and determine divers felonies, trespasses and misdemeanors, committed within the said city of London, a certain charge against the said Richard Stephenson (that is to say) a charge, that the said Richard Stephenson had, on the high seas, within the jurisdiction of the admiralty of England, on board a certain ship, unlawfully made an assault upon her the said Mary Popplewell, with intent her the said Mary Popplewell, feloniously and against her will, to ravish and carnally to know ; to wit, at &c. and that the defendants well knowing the premises, but being malicious and ill disposed persons, and devising and intending to traduce, defame, and aggrieve the said Richard Stephenson, and to injure and prejudice him in the minds of the liege subjects of our Lord the King, and to cause it to be believed, that he was guilty of the said assault, and thereby to prevent the due administration of justice, and to deprive the said R. S. of the benefit of an impartial trial, for and concerning the matter of the said charge, did, on the 12th day of October, in the 50th year, &c. at &c. wilfully and maliciously print and publish, and cause and procure to be printed and published, a certain scandalous, malicious and defamatory libel, of and concerning the said charge and the matter thereof, which said scandalous and malicious libel

bel was and is according to the tenor and effect following, (that is to say) " Police.—Mansion House. The Captain, for whose apprehension a warrant has been issued, as we stated in our yesterday's paper, was apprehended on Wednesday afternoon by two of the city officers, at the house of his attorney, and underwent a private examination before the Lord Mayor yesterday morning. His name is Stephenson and the charge preferred against him was, for assaulting Mrs. Popplewell, the wife of Mr. Popplewell, who, we understand is attached to the commissariat department in the Isle of Barbadoes, with intent to commit a rape on board his own ship, the Mentor, on her passage to England. The circumstances of this case, so disgraceful to Captain Stephenson, are, we understand, as follows:—Mrs. Popplewell embarked at the Isle of Barbadoes on board the *Rachael*, Captain Carr, being, one of the last West India convoy, amongst which was also the *Mentor*, commanded by Captain Stephenson, with intent to join her husband in London. In the course of the voyage, a dead calm stopped the progress of the fleet, and mutual visits were paid from the different ships; amongst others, the passengers and officers of the *Rachael*, were invited to partake of a repast on board the *Mentor*, and Mrs. Popplewell, accompanied by Captain Carr and some other persons, accordingly proceeded in the ships' boat to the vessel, where they were hospitably received and luxuriously entertained by Capt. Stephenson, who was peculiarly marked in his attentions to Mrs. Popplewell during the day. While the party were enjoying the pleasures of the feast, however, a brisk gale

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v.
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and Others.

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FISHER
and Others.

gale sprung up, and the surface of the ocean, which had previously been undisturbed by the slightest zephyr, became now agitated with considerable fury, to the no small alarm of Mrs. P., who became exceedingly desirous to return to her own ship. From this step, however, she was deterred by the roughness of the sea. In this dilemma, Captain Stephenson, with much apparent politeness, begged she would not make herself uneasy, observing, if she was not afraid to remain under his protection, he would give her such accommodation, and endeavour to consult her comfort and happiness in such a manner, as to leave her no ground to lament her temporary absence from the Rachael. After some persuasions, Mrs. P. agreed to accept the offer, as from the increasing strength of the wind, she saw there was no hopes of her being able to get back that night by the boat, without being exposed to hardships extremely unpleasant for a female to encounter.— Captain Carr and his male friends therefor quitted the ship, leaving Mrs. Popplewell behind them, and returned to the Rachael. The state cabin was then prepared by Captain Stephenson's directions for his fair visitor, to which she soon after retired, but had not remained there long, when the obtrusion of the Captain upon her privacy, excited no little astonishment, which, from his subsequent conduct, increased to the utmost alarm. He commenced his attack by apologising for his entrance, and by ascribing his unexpected visit to the impression which the charms of Mrs. Popplewell had made upon his too susceptible heart. He proceeded in the same strain of fulsome flattery for some time; but finding that

his eloquence had no other effect than to raise the indignation of his innocent visitor, he proceeded from words to deeds, and having, in the first instance, imprinted some impassionate kisses, he took some other liberties with the person of Mrs. P. which decency forbids our describing, but which so far irritated and terrified Mrs. P. that she shrieked with the utmost violence. Her cries at length attracted the attention of a gentleman named *Austin*, who was a passenger in the vessel, and who instantly rushed to the spot, in time to prevent the perpetration of the vile and dishonourable intentions of the Captain, from whose loathsome embrace he extricated his almost senseless victim. The ensuing morning, Mrs. P. returned to the Rachael, and on her arrival in this country, instantly informed her husband of the atrocious manner in which she had been treated, and immediate application was made for a warrant, in consequence of which, the criminal is likely to meet the legal punishment of his villainy. The result of the examination yesterday was, that the Captain was himself held to bail in £1000, with two sureties in £500 each, to answer for his appearance at the Admiralty Sessions or Court of King's Bench, as the parties may think fit, to take his trial for the offence. Mrs. Popplewell is a woman of an interesting and intelligent countenance, about five and twenty years of age. The Captain had nothing either captivating or prepossessing in his appearance, and is about 30. He did not seem the least affected at his disgraceful situation, nor to feel, in the slightest degree, the very contemptuous manner in which he was regarded by all who were aware of his unmanly conduct. He employed

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employed a short hand writer, a barrister, and a phalanx of friends, if possible, to intimidate his accuser by the publicity of her exposure." Notwithstanding these attempts, however, to screen himself behind her delicacy, she gave her testimony in the clearest and most collected manner, which conscious innocence and innate virtue could only have enabled her to accomplish. This was the only examination which occurred at this office worth detailing." To the great damage, &c.

In support of the first averment in the indictment, the deposition was given in evidence which Mrs. *Popplewell* had made before the Lord Mayor. The facts stated in this were not materially different from the narrative part of the libel, except that the outrage was sworn to have been committed in a voyage from England to the West Indies.

Marryat, for the defendants, insisted that the publication could not be considered a libel, as it contained a just and true account of a judicial proceeding. He relied upon *Curry v. Walter*, 1 *Bos. & Pul.* 525, in which the Court of Common Pleas held, that an action could not be maintained, for publishing a true account of the proceedings of a court of justice, however injurious such publication might be to the character of an individual,—and *Rex v. Wright*, 8 *T. R.* 293, where the Court of King's Bench refused to grant a criminal information against a bookseller as for a libel in printing a true but unauthorised copy of a report of the House of Commons, which

which reflected on the character of an individual, and the doctrine was broadly laid down, that it is neither the subject of a criminal prosecution, nor of an action for damages, to publish a true account of the proceedings in parliament, or of courts of justice. That doctrine has been since invariably recognized, and was lately acted upon in the case of *Rex v. Forbes*, before Mr. BARON THOMPSON, at Winchester.

— Proceedings before magistrates, stand upon the same principle. It is of the utmost importance, that such proceedings should be public, and if individuals in any instance are thus injured more deeply by groundless charges being brought against them, they have their remedy against their accusers. There is no danger of persons committed being deprived of a fair trial by means of such publications. As they are known to be *ex parte*, implicit credit is not given to them, and men keep their judgments suspended, till the day of trial arrives. Besides, the law does not suppose that jurymen are entirely ignorant, when they come into the box, of the matters they have to try; for they were required to come from the neighbourhood of the place where the offence was committed; and it is well known, that when any case of public interest arises, it is universally talked of, and innumerable reports concerning it are whispered abroad, from which the minds of jurymen are in much greater danger of being poisoned, than from authentic accounts of the informations upon oath before the committing magistrate. The sense of the legislature has been lately declared upon this subject. A bill was introduced into parliament to prohibit these

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v.
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and OTHERS.

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and Others.

publications (which shews, that they were not unlawful before); but the opinion of enlightened men being, that the general benefit arising from them outweighs the private inconveniences, the bill was dropped.

Lord ELLENBOROUGH.—If any thing is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before, *ex parte* statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? By their own public declarations we know that the minds of jurymen are often pre-occupied by such statements, and that they proceed with terror to the discharge of their duty, from the apprehension that an antecedent bias may influence their verdict. These publications tend alike to the conviction of the innocent and the acquittal of the guilty. I fully accede to the cases cited on the part of the defendant. But how can the publication of preliminary examinations taken *ex parte* be brought within the scope of those determinations? The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal. What is injurious to individuals and to the community the law considers criminal.—To look to the case before us,—it must be

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be the anxious wish of all that the person accused by this lady should have a fair and impartial trial. The honour and security of the female sex are involved in the issue. Does this publication leave the mind in a state of equipoise as to his guilt or innocence?— No one, with the feelings of a man, can read it without being roused to indignation against the person whose misconduct is depicted in such glowing colours. Even if a fair and dispassionate account of the examination were allowed, is this account fair and dispassionate? It comes to conclusions which would only be fair after verdict. It assumes every thing that the woman said to be true, and represents the accused as conscious of his guilt. It talks “of the contemptuous manner in which he was regarded by all who were aware of his unmanly conduct,” and triumphantly asserts that “he is likely to meet the legal punishment of his villainy.” Allowing the utmost latitude to fair and candid statement, is this to be tolerated? Jurors and Judges are still but men; they cannot always control feelings excited by such inflammatory language. If they are exposed to be thus warped and misled, injustice must sometimes be done. Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice.—

1811.

Rex
v.
Fisher
and Others.

But what defence can be made for a publication like this, which besides containing an *ex parte* statement of evidence before a magistrate against a man who has had no opportunity to defend himself, actually denominates him a '*criminal*', and describes him as a monster? It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and his character. We would then wish to meet a jury of our countrymen with unbiassed minds. But for this there can be no security if such publications are permitted. The necessary tendency of the libel was, in the language of the indictment, to traduce and defame the prosecutor, and to prejudice him in the minds of his countrymen, and to cause it to be believed that he was guilty of the assault laid to his charge, and to deprive him of the benefit of an impartial trial. If so, the law infers that such was the intention of the defendants in publishing it, and they must answer for the injury they have thus done to the prosecutor individually, and to the community of which he is a member.

The defendants were found guilty.

Garrow and *Gurney* for the prosecution.

Marryat and *Marriott* for the defendants.

Vide Stiles v. Nokes, 7 East, 493, . . .

THOMPSON

THOMPSON v. MABERY.

Monday,
February 19.

A SSUMPSIT for the use and occupation of furnished apartments.

Plea, the general issue, except as to £63. 10s.—
and as to that a tender.

The sum claimed by the plaintiff was £93. 19s.

If premiums are taken for 12 months, then, and six months afterwards, the
policy may be renewed by a
written notice
expiring
end of the
next year.

On the 28th of November 1808, the defendant took the apartments "*for 12 months certain, and six months' notice afterwards.*" The year was to begin from the 25th of December following; but he entered on the first of that month, and the odd sum of £3. 10s. was for rent during this interval. On the 25th of May 1809 the defendant gave notice that he should quit at the end of the year, and he accordingly quitted the apartments before the following Christmas.

Topping, for the plaintiff, contended, that the defendant, under the above taking, was not at liberty to quit till six months' notice had been given after the expiration of the first year.—But—

Lord ELLENBOROUGH was clearly of opinion that the defendant was only bound to remain the 12 months certain, and that he was at liberty to quit at

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v.

MABERLEY.

the end of that period, by giving 'six months' previous notice. His Lordship laid considerable stress upon the word *certain*, applied to the first 12 months, which shewed that every thing afterwards was *uncertain*, and depended on the notice.

However, there being an irregularity in the tender, the plaintiff had a verdict with nominal damages.

Topping and A. Moore for the plaintiff.

Garrow for the defendant.

[Attorneys, *Baxter and Daniel*].

But a demise "not for one year only, but from year to year," enures as a demise for two years at least. *Denn. d. Jack-* *lin v. Cartwright*, 4 East, 29; and so if a demise "for a year, and so from year to year." *Birch v. Wright*, 2 T. R. 380.

Tuesday,
February 19.

In an action by the indorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it.

REES v. MARQUIS OF HEADFORT.

THIS was an action against the defendant as acceptor of a bill of exchange, drawn by one *Whitton*, payable to his own order, indorsed by him to *Chamberlaine & Co.*, and by them to the plaintiff.

The plaintiff made out a *prima facie* case; but *Whitton*, the drawer, having been called to prove the hand-writing of one of the parties, it appeared from his cross examination, that lie himself had never received

ceived any consideration for the bill, and had been tricked out of it by means of a gross fraud.

Lord ELLENBOROUGH held that on this ground the plaintiff was bound to prove what consideration he gave for it; and as he was not prepared to do so, his Lordship directed a nonsuit.

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REES
v.
Marquis of
HEADFORT.

Park and *Cbmyn* for the plaintiff.

Garrow and *Topping* for the defendant.

[Attorneys, *A'Beckett* and *Evans*.]

S. P. where the bill was drawn without consideration and under duress. *Duncan v. Scott*, 1 Camp. 100.

COLWILL, v. REEVES.

Tuesday,
February 19.

TRESPASS for breaking and entering the plaintiff's house, and taking his goods. Plea, the general issue.

A shopkeeper may maintain trespass for taking goods sent to him on sale or return.

The plaintiff was stated to carry on the business of a furniture broker at the house in question; and it appeared that (amongst other things) a sofa, sent to him *on sale or return*, had been carried away by the defendant as part of the goods of one *Grindley*, a bankrupt.

1811.

COIWILL

v.
RELVIS.

bankrupt, who had carried on the same business in the same house.

Park objected that the plaintiff could not maintain trespass for this sofa, as the property in it while unsold continued to abide in the original owner, and the plaintiff was merely his servant to take care of it. But

Lord ELLENBOROUGH held that the plaintiff had a special property in the sofa, which, coupled with the possession, enabled him to maintain trespass for it in his own name.

If A formulates a fraudulent purpose mixed in goods with B's, still if the goods distinguishable, he retains the property in them, and he may in certain trespasses against a person who having a right to take B's good, ignorantly takes these goods of A as part of B's.

Park opened as a complete defence to the whole action, that *Grindley* alone had really carried on the business in this house; that becoming bankrupt, it was concerted, for the fraudulent purpose of protecting his goods from his assignees and his creditors, that the plaintiff should send into the house some articles of furniture to be mixed with his; that the plaintiff with this view sent in the goods for which the action was brought; and that they were ignorantly taken by the messenger under the commission, as part of the effects of *Grindley*.

Lord ELLENBOROUGH.—If a man puts corn into my bag, in which there is before some corn, the whole is mine; because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty. The goods in question remained distinct, and the messenger might have

discovered that they belonged to the plaintiff. He took them at his peril. Whatever fraud there might be in the case, the property was not divested from the plaintiff, and the stratagem described is no defence on the general issue to an action at his suit for taking and converting the goods.

The plaintiff had a verdict on the *asportavit*.

Garrow, Jehyll, and Marryat for the plaintiff. *

Park and Storks for the defendant.

[Attorneys, *Williams and Mills.*]

1811.
Colwill
v.
Reeves.

If A embroiders B's cloth, or converts his metal into vessels or utensils, the property of the materials in their improved state still remains in B; but if A makes oil or wine of B's olives or grapes, this being a new species of commodity, it belongs to A, and he shall render a compensation to B for the materials. If A wilfully intermixes his money, corn, or hay, with that of

1811.

Wednesday,
February 20.

An attorney is not at liberty to disclose in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cause before the Court.

Rex v. Withers and Others.

THIS was an indictment for breaking open the house of one *Copland*, the prosecutor, and assaulting and imprisoning his person.

On the part of the defendants, Mr. *Phillipson*, an attorney, was called to state that the same day the assault was committed, the prosecutor consulted him professionally, and gave an account of the transaction materially at variance with his testimony in the witness-box; and that on the same occasion a Mr. *Bruce* who accompanied him, had in his hearing directed Mr. *Phillipson* to bring an action of trespass against the defendants, for breaking and entering the house now represented to be the prosecutor's as the house of him Mr. *Bruce*.

It was objected that the whole that passed between Mr. *Phillipson*, and the prosecutor and *Bruce*, on this occasion, was privileged on the score of professional confidence.

Garrow, for the defendants, insisted that at any rate the privilege could not extend to what was said by *Bruce* in the prosecutor's hearing; that this was a communication by a third person to his attorney;

as *Bruce* was no party to this prosecution, no as to *what* could be made on his behalf to the disclosure remained ~~done~~.

Lord Ellenborough said, that an attorney is not at liberty to disclose what is communicated to him confidentially by a client, although the latter be not in any shape before the Court; and Mr. *Phillipson* was not permitted to be examined.

1811.
Rex
v.
WITHERS
and Others.

The defendants were found guilty.

Topping and *Marryat* for the prosecutor.

Garrow and *Gurney* for the defendants.

[Attorneys, *Fothergill* and *Reilly*.]

Vide Wilson v. Rastall, 4 T. R. 753.

WILSON and Others, Assignees, &c. v. BALFOUR.

Thursday,
February 21.

THIS was an action of trover, brought by the assignees of the partners in the late banking-house of *Devaynes & Co.* for certain sums which had belonged to them, of the value £ 1000.

Devaynes & Co. were the defe-

ters, and

up certain bonds belonging to them in an envelope in a memorandum, stating that they had deposited the stock, which they promised to replace: This parcel longing to other persons who dealt with them, but gave to the customer till the eve of their bankruptcy, where they must stop payment next morning. Held that the assignees of the bankers.

Bankers having fraudulently sold out stock belonging to a customer which stood in their names, and applied the proceeds to their own use; while they remained solvent wrapped up customer's name, and losing a collateral security for the securities before circumstances bonds, saying against the

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WILSON
and Others
v.
BALFOUR.

he had £16,000 navy 5 per cents standing in the name of *Noble*, one of the partners. On the 19th and 21st of July 1810, the house being pressed for cash, *Noble* sold out the whole of the defendant's 5 per cents, and applied the proceeds to the partnership purposes. On the last of these days, *Noble* inclosed the bonds in question, which belonged to the partnership, in an envelope. Along with them he put in a memorandum in his own hand-writing to the following effect:—Borrowed and received of J. Balfour, Esq. £16,000 navy 5 per cents, which we promise to replace, and we have deposited with him, as collateral securities, these bonds of the Earl of Oxford and Mortimer, and others, which we promise to assign when required." He then sealed up the bonds, and wrote upon the envelope, "The property of John Balfour, Esq." This packet he deposited in an iron chest among the securities belonging to other customers. There it lay till the 30th of July. In the interval there had been a great run upon the house, and the partners now intimated to the clerks that they must stop the next morning.—In the evening of this day *Noble* sent off the packet with the bonds to the defendant, accompanied with the following letter:

"Sir,

we have made use of your navy 5 per cents. In your name, we send you the inclosed bonds to satisfy you against any loss, as we hope to suspend our payments to-morrow.

This

This was the first intimation ever made to the defendant that his 5 per cents. had been sold, or that the bonds had been appropriated to his use.

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and Others
v.
BALFOUR.

Mr. *Noble* was examined as a witness, and stated, that at the time when he inclosed the bonds in the envelope, and until the 30th of July, he had no idea the house must stop, although they had been for some time in difficulties; he intended, had they gone on, to have replaced the stock of the defendant, who in that case would never have known of its being sold; they might have taken the bonds at any time from the iron chest, and disposed of them as partnership stock.

It was proved that the partners all committed acts of bankruptcy on the 31st of July, the day on which the commission bore date.

" Park, for the defendant, allowed that if the letter of the 30th had been the first appropriation of these bonds to his use, he would have no right to retain them, as that letter was evidently written in contemplation of bankruptcy. But the transaction was to be referred back to the 21st, when no apprehension was entertained of the house being insolvent. If the bonds had been then assigned to the defendant, there could be no doubt that the property in them would have been transferred to him, and without the assignment, he had the same right to them in equity. He had a lien upon them for the value of his 5 per cents. They were ear-marked, and cease to form a part of the general partnership property. *Noble* was the

1811.

WILSON
and Others
v.
BAILEY.

the defendant's agent as well as a partner in the banking house. Therefore, when deposited in the iron chest, they were to be considered as in the defendant's possession.

Lord ELLENBOROUGH.—I am of opinion that the defendant has no right to the bonds in question.—You say he has a lien upon them. A lien means a right to hold. But the defendant never held these bonds ; he had no possession of them till the very eve of the bankruptcy, when it is conceded the bankrupts could not give a preference to one creditor over the others. On the 21st and down to the 30th, they only intended to deliver the bonds to the defendant. The whole rested in intention. The possession was never put out of themselves. Noble was no agent of the defendant for the purpose of receiving the bonds. The defendant was entirely ignorant of the transaction. Noble was a wrong doer in selling the 5 per cents ; and after that breach of trust, the defendant was placed in the same situation as the other creditors of the house. A contemplated appropriation cannot be a virtual transfer. Had the memorandum been true, had the bonds been deposited with the defendant, he would have had an equitable title to them, and might have retained them till his debt was satisfied. But they were not deposited with him ; they remained in the possession of the bankrupts ; they might have been taken from the iron chest and carried into the market without ever knowing that his name had been written on the envelope. Had the affairs of the company been retrieved, his stock would have been replaced, and

he never would have heard of these bonds that are supposed to have been deposited with him. The memorandum recites a false state of facts. *Noble* merely put down upon paper an idea floating in his brain. No legal or equitable right to the bonds was transferred by his act. It is a case of extreme hardship on the part of the defendant; but the rules of law must not bend to our feelings or our wishes.

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WILSON
and Others
v.
BALFOUR.

Verdict for the plaintiff.

Park in the ensuing term brought the point before the Court; but the Judges were all clearly of opinion that the direction at *Nisi Prius* was right, and refused a rule to shew cause why there should not be a new trial.

The *Attorney General*, *Garrow*, and *Richardson* for the plaintiff.

Park and *Topping* for the defendant.

(Attorneys, *Clayton* and *Seymour*.)

REX v. HUNT and Another.

Friday,
February 29.

THIS was an information by His Majesty's Attorney General, for a libel in a newspaper called *The Examiner*.

"pos'd, printed, and published" a libel, if he is proved to have published without having composed it.

The defendant may be found guilty upon a count in an information which charges him with having "com-

The

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Rex
v.
Hunt
and Another.

The first count in the information charged that the defendants *composed, printed, and published* the libel. There were other counts for printing and publishing, and for publishing only.

The Counsel for the Crown merely adduced the evidence required by stat. 38 Geo. 3. c. 75 (a) & 2, a certified copy of the affidavit sworn by the defendant at the stamp office, and a newspaper containing a copy with the title of the newspaper described in the affidavit.

Brougham, for the defendants, contended that they must be acquitted on the first count, which charged them with *composing* the libel as well as printing and publishing it. This was a distinct and aggravated offence. If a man was both the author and publisher of a libel, he was guilty of a higher breach of the laws, and deserved a greater measure of punishment, than if he merely published what had been written by another and the tendency of which he himself might not understand. Here, although the evidence given was, according to the statute, sufficient to shew that the defendants had published the paragraph charged to be libellous, there was no evidence to shew that they were concerned in its composition.

Lord ELLENBOROUGH.—It is enough to prove publication. If an indictment charges that the defendant did and cause to be done a particular act, it is enough

(a) *Vide Rex v. Hart and White, 10 East, 94.*

to

to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shews that the defendant has committed a substantive crime therein specified.

1811.
Rex
v.
Hunt
and another.

The Jury found a verdict of *Not Guilty*.

The *Attorney General, Garrow, Abbott, and Richardson* for the Crown.

Brougham and *E. Lawes* for the defendants.

Vide Regina v. Ingram, Salk. 384. Rex. v. Williams post.

 ADJOURNED Sittings IN LONDON

Monday,
February 25.

WEINHOLT v. ROBERTS.

In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by the plaintiff to the defendant, which the latter effected with a *detracted* commission.

ACTION for premiums of insurance by an underwriter against an insurance broker.

The defence was, a set-off to a larger amount than the sum claimed. It was stated, that the plaintiff had underwritten to the defendant a policy on the ship *Margaret*; that an average loss had happened upon this policy, which the plaintiff himself had acknowledged amounted to £15. 6s. 0d. per cent.; that the defendant had a *del credere* commission from the insured, for guaranteeing the solvency of the plaintiff and the other underwriters, and that the defendant had therefore a right to set off this loss against the premiums.

Garrow, for the plaintiff, denied that these were mutual debts, the loss being due to the insured only, though recoverable by the defendant as their agent, and pointed out the embarrassing situation in which the underwriter would be placed, if he could be called upon, both by the insured and the broker, to pay the loss, and if either of them could set it off to an action at the underwriter's suit.

Lord

Lord ELLFBOROUGH —The broker, with a *del credere* commission, may be looked upon as the owner of the policy; and he being answerable to the insured for the loss, the amount may be considered as due to him, and may be set off in an action brought against him by the underwriter for premiums. Therefore, if the defendant proves the facts opened, he will be entitled to a verdict.

1811.
WILKINSON
&
ROBLES.

But the *del credere* commission being in writing, could not be regularly proved, and there was a verdict for the plaintiff.

Garrow and Mowat for the plaintiff.

Topping for the defendant.

[*Attorneys, Jones and Vaca*]

Eude Grove v. Dubois, 11. R. 112. *Bize v. Dickason*, *Ib.* 28.

Cock v. TAYLOR and Another.

Tuesday,
February 26.

THIS was an action for the freight of goods brought from Algiers to London, in the ship *Whom*, of which the plaintiff was master.

If by a bill of lading, and are made derivable to A or his assigns, it is the freight for me.

time, and A signs the bill of lading to B, and B assigns it to C, who receives the goods under it, C is liable to an action for the freight at the suit of the master of the ship.

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Cock
v.
Taylor
and Another.

The bill of lading stated the goods to be shipped by Robert Montgomery and Co. "to be delivered at London, unto the order of Messrs. Hargreaves and Dalzel, or to their assigns, he or they paying freight for the same as customary, with primage and average accustomed."

This bill of lading was indorsed by *Hargreaves & Dalzel*, at *Algiers*, to *William Peters*, at *Gibraltar*, and by him to *Taylor & Son*, of *London*, the defendants, to whom the goods were delivered.

Park, for the defendants, contended that an action for freight could not be maintained against the assignees of the bill of lading. The captain had a lien upon the goods for his freight; but if he chose to part with them, he must resort to the contract on which the goods were shipped, and proceed against the original parties to the bill of lading. The persons primarily liable for the freight could not, by their own act, in assigning the bill of lading, transfer that liability, and give a right of action against a stranger. And the case of *Artazza v. Smallpiece*, 1 *Esp. N. F. Cas.* 23, was relied upon as in point.

Lord ELLENBOROUGH.—The bill of lading makes the goods deliverable to Hargreaves and Dalzel, or their assigns, he or they paying freight for the same. The defendants, by becoming assignees of the bill of lading and receiving the goods, adopt the contract. They were aware on what terms the goods were to be

be delivered, and by accepting them they accede to those terms. They derive a benefit from the plaintiff's services, and must be supposed to promise him a recompence. There is no transfer of contract or right of action. Till the delivery, there was no debt due from any one, and the assignees then became liable. The bill of lading may be considered to have been in blank, and to have been filled up with the name of the person to whom the delivery is made.—The liability is to devolve upon a sort of floating appointee, and when he is determined, he is supposed to be a party to the bill of lading, and to enter into the contract with the master which is therein contained. To whom do *Hargreaves & Dalziel* order the goods to be delivered?—To *Taylor & Son*, the defendants. They take them, and they must pay the freight.

.. Verdict for the plaintiff.

In the ensuing term, *Park* applied for leave to enter a nonsuit, contending, that after the captain had parted with the goods, his only remedy was an action against the original parties to the bill of lading. But the Court thought, that the defendants, by accepting the goods, entered into an implied undertaking to pay the freight, and a rule to shew cause was refused.

Garrow and *Taddy* for the plaintiff.

Park and *Lawes* for the defendants.

{ Attorneys, *Kays & Freshfield*, and *Thomas*.}

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Cock
v.
Taylor
and Another.

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COCK
v.
TAYLOR
and Another.

As to the liability of the consignee, *vide* Roberts v. Holt, 2 Show. 413. Where goods, by the bill of lading, are deliverable to the consignee, on his paying freight for the same, if they

are delivered to the consignee, the freight cannot be recovered from the consignor. Penrose v. Wilkes, Abb. Shipp. Part 3. c. 7. s. 14.

Tuesday,
February 26.

MILLER v. BRANT.

THIS was an action by a foreign seaman against his captain, for wages earned on a voyage from Russia to the port of London.

The defence was, that the plaintiff had signed articles, whereby it was provided that if any of the crew should absent themselves from the ship before she was unloaded, without the master's leave, they should forfeit the whole of their wages; and that after the arrival of the ship in the port of London, and before she was unloaded, the plaintiff was absent from her, without leave, a day and a night.

These facts were proved; but it further appeared, that when the plaintiff returned to the ship, the defendant again took him into his service, and that he worked in discharging the ship like the other men.

—Lord ELLERBOROUGH.—I am of opinion that the forfeiture was waived. The defendant might have refused to receive the plaintiff again, or insisting on the forfeiture

forfeiture, might have entered into a fresh agreement with him ; but by permitting the plaintiff to return and to work in the discharge of the cargo, he must be taken to have pardoned the offence which had been committed, and he cannot afterwards revert to the forfeiture. The plaintiff is therefore entitled to his wages at the stipulated rate, as if there had been no infraction of the articles.

Verdict accordingly.

Topping and Espinasse for the plaintiff.

Park and Nolan for the defendant.

[*Attorneys, Ruppinham and Jones.*]

1811.
Miller
v.
Brant.

FARRANCE v. ELKINGTON.

Wednesday,
February 27.

THIS was an action on 11 Geo. 2. c. 19. for double rent.

The first count of the declaration stated, that the defendant held a dwelling-house as tenant thereof to the plaintiff, and on the 20th February 1810 gave notice to the plaintiff of his intention to quit the said dwelling-house *as soon as he could possibly get another situation*; that on the 29th of September following he did get another situation and ought to have quitted

If tenant from year to year give his landlord notice that he will quit upon a contingency, and does not quit when the contingencies happens, he is not liable to an action on 11 G. & 2. c. 19. for double rent.

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FARRANCE
v.
ELKINGTON.

the plaintiff's dwelling house, but that he remained in possession of it till the 25th of March 1810 ; whereby he became liable to pay £108, being double the yearly rent for the time he so held over after the expiration of the notice to quit.

The declaration being opened,—

Lord ELLENBOROUGH expressed himself of opinion that the notice to quit was too vague, and that this case did not come within the statute.

Garrow and *Campbell*, for the plaintiff, brought to his Lordship's notice the words of the statute, which are, "that if any tenant shall give notice of his intention to quit the premises holden by him at a time mentioned in such notice, and shall not deliver up the possession thereof accordingly, then such tenant shall thenceforward pay to the landlord double the rent which he should otherwise have paid." The time mentioned in this notice was,—as soon as the tenant could get another situation. When he got another situation, the time was ascertained. *Id certum est quod certum reddi protest.*

Lord ELLENBOROUGH.—I am clearly of opinion that the notice is not within the statute. It only amounts to this, that the defendant would quit when he found it convenient. There must be some fixed time mentioned before the double rent can attach.—Would the landlord have been bound by this notice?

Could

Could he let the house to another tenant on the contingency of the defendant's getting a situation to suit him. This attempt to recover double rent under the present circumstances is an experiment which had better have been avoided (*u*).

There being other accounts for use and occupation, and for not using the premises in a tenantable manner, the cause was referred.

Garrow and *Campbell* for the plaintiff.

Park and *Espinasse* for the defendant.

[*Attorneys, Arrowsmith and Rhodes.*]

(a) The facts of the case plaintiff's at a considerable premium, were, that the defendant held the house in question at a rent greatly under its value; that he gave a notice in writing, to the purpose stated in the declaration; that on the 29th of September, he himself removed to another house which he purchased; and that he underlet the

There is no necessity for a notice under this act of parliament to be in writing, at least where the tenants holds under a parol demise. *Timmins v. Rowlinson*, 3 Barr. 1603.

Thursday,
February 28.

BROWN v. PIGEON.

An action cannot be maintained for a malicious arrest by A. against B. if A. owed B the sum for which he was held to bail, although B. was indebted to A. to a larger amount.

THIS was an action for a malicious arrest.

Pigeon owed *Brown* £23. *Brown* owed *Pigeon* £10.—*Brown*, meaning to allow the latter sum by way of set-off, arrested *Pigeon* for the balance of £13. Immediately after, *Pigeon* arrested *Brown* for £10, which was the act now complained of. *Pigeon* took out a summons to stay proceedings in the action against him, and offered to pay £23. *Brown* refused to take more than £13. A judge finally ordered proceedings to be stayed in the action against *Pigeon*, on payment of £13 and costs, and in that against *Brown*, on payment of £10, without costs.

Park, for the plaintiff, contended, that when he was arrested, he was not indebted in any sum of money whatever to *Pigeon*, who on the contrary, by his own confession, owed him £13. It is only the sum due upon striking a balance, that can be considered the sum due from one party to another.—The defendant had, therefore, held the plaintiff to bail maliciously, and without any probable cause.

Lord ELLENBOROUGH.—The defendant's conduct in this transaction was highly vexatious and reprehensible; but this action cannot be maintained. He had

had not only a probable, but a real cause of action against the plaintiff at the time of the arrest. The cross demands were separate and distinct. The statute of set-off is not compulsory. The defendant was not obliged to set off the debt due to him from the plaintiff, and the plaintiff, although he held the defendant to bail only for £13, might have recovered the £23. The defendant's harrassing proceeding was a fit subject for a summary application to a judge, which had been effectually made; but when a debt of £10 was due to him, he is clearly not liable to an action for maliciously holding the plaintiff to bail without any reasonable or probable cause.

1811.

BROWN
v.
PIGEON.

A juror was withdrawn.

Park and *Espinasse* for the plaintiff.

Garrow and *Barrow* for the defendants.

[Attorn^s, *Tilly* and *Godmond*.]

Vide Tid. Plac. 153. Dr. *Curlington's case*, 4 Burr 1996.

REYNOLDS

Friday,
March 1.

REYNOLDS v. CHETTLE.

If a bill of exchange is accepted "payable at Messrs. A. B. & Co.'s who are bankers in the city of London, a presentment of the bill for payment to their clerks, at the *Clearing House* is sufficient.

THIS was an action by the indorsee, against the acceptor of a bill of exchange, accepted, *payable at Messrs. Harrison and Co.'s*.

These gentlemen carry on their business of bankers at No. 1, *Mansion House Street*, in the city of London. The bill, when due, was presented at the *Clearing House* (*a*) in the city, to the clerks of Messrs. *Harrison & Co.*, who said, it would not be paid.

Garrow, for the defendant, insisted, that according to the late decision in C. P. (*b*), the plaintiff was bound to shew, that the bill was presented at the banking house of Messrs. *Harrison and Co.* in *Mansion House Street*.

Lord ELLENBOROUGH.—I think a presentment to the banker's clerks in the *Clearing House*, was a presentment at Messrs. *Harrison and Co.*'s within the meaning of the acceptance.

The defendant had given the plaintiff notice, to prove what consideration he gave for the bill; which, it was submitted, he was bound to prove accordingly.

In action on a bill of exchange, the plaintiff cannot be compelled to prove what consideration he gave for it, by a mere notice that he will be required so to do.

(*a*) *Vide Fernandey v. Glynn*, 1 Camp. 426. (*b*) *Callaghan v. Aylett*, *ante* 550.

Lord ELLENBOROUGH.—The notice is insufficient to throw this burthen on the plaintiff. You must first cast some suspicion upon his title, by shewing that the bill was obtained from the defendant, or some previous holder, by force or by fraud,

1811.

REYNOLDS
v.
CHETTLETON

The plaintiff had a verdict.

Gasclee for the plaintiff.

Garraw for the defendant,

[Attorneys, Weston and Minskill.]

Fide Rees v. Marquis of Headfort, ante, 574.

LANYON v. BLANCHARD.

Friday,
March 1.

THIS was an action to recover the amount of a loss received by the defendant, upon a policy of insurance which he had effected as a broker.

The plaintiff being at *Monte Video*, wrote to one *Crowdy* at *Falmouth*, inclosing an unindorsed bill of lading, of certain tallow, deliverable to the shipper's order, and directing him to effect an insurance on the tallow, and to employ a good house at *Liverpool*.

If an agent, employed to effect an insurance on goods, represents himself as the owner of the goods to another person whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent.

1810.

LANYON
v.
BLANCHARD.

sell it, for the plaintiff's benefit. *Crowgy* came to *London*, employed the defendant to effect the insurance, represented that he had authority to indorse the bill of lading, and actually did indorse it accordingly, to a person at *Liverpool* named by the defendant. The defendant effected the policy. The ship was lost, and he received the sum insured from the underwriters. This he claimed to retain, to satisfy a balance due to him from *Crowgy*.

Garrow, for the defendant, contended, that he had a general lien upon the policy before the loss, and upon the money received since, as between himself and the person by whom he was employed. *Crowgy* represented himself in this transaction not as an agent, but as a principal. He appeared to have authority to indorse the bill of lading, and the defendant had no means of knowing, that the tallow was to be sold for the account and benefit of the plaintiff. The former cases upon this subject had turned upon, whether a principal was disclosed, or the person employing the broker appeared as principal himself. Here *Crowgy* assumed dominion over the bill of lading, and the defendant had reason to believe, that the policy was effected for his benefit. —But—

Lord ELLENBOROUGH was of opinion, that in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent, must run the risk of their being true or false; and that

as

as *Crowdy* had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a sub-agent, and could not retain the sum he had received upon the policy from the person, for whose ultimate benefit it was effected.

1810.
LANYON
v.
BLANCHARD.

Verdict for the amount of the loss, subject to a deduction for the premiums and other charges due on this particular policy.

Park, Jerris and Richardson, for the plaintiff.

Garrow for the defendant.

Lide Maans v. Henderson, 1 East, 325. *Snook v. Davidson*, *et al.* 218.



ACKLAND v. PEARCE.

Coram Le Blanc, J. (a).

Saturday,
March 2.

THIS was an action on a bill of exchange for £386, dated 15 May, 1810, accepted by *J. Wain*, drawn by the defendant, payable to his own order 10 days after date, and indorsed by him to the plaintiff.

A bill of exchange is void in the hands of a bona fide indorsee, if it was drawn in consequence of an unusual agreement.

ment for discounting it, although the drawer, to whose order it was payable, was not privy to this agreement.

(a) Lord ELLENBOROUGH C. J. was this day at Windsor attending the Queen's council.

1810:

ACKLAND
v.
PEARCE.

Defence,—usury in the formation of the bill.

J. Wain, the acceptor, swore, that being much pressed for the sum of £250, he applied to one *White* to discount a bill for that amount. *White* refused, as the bill had too long to run, but offered if he could get *Pearce*, the defendant, to draw a bill to be accepted by him at 10 days, for £386, to give him £250 in cash, and a returned bill of another person for £136, on condition that he, *White*, should receive for this accommodation the sum of £10. The bill in question was accordingly, at *Wain's* solicitation, drawn and indorsed by the defendant, who was not made acquainted with the agreement. *Wain* having accepted the bill, carried it to *White*, received from him a cheque for £250, but not the bill for £136, or any thing more, and paid him the stipulated sum of £10.

Topping, for the plaintiff, contended, that this was not usury which would defeat this action, as the agreement was not between the parties to the bill. The defendant was entirely ignorant of the manner in which the bill was to be discounted, and its character could not be determined by what took place between the acceptor and third persons. The usury was in the discounting of the bill, and not in its formation. It was therefore valid in the hands of a *bona fide* indorsee for value.

Le Blanc, J. I am clearly of opinion, that if *Wain* is believed, this action cannot be maintained. The bill was drawn under an usurious agreement. The drawer's

drawer's ignorance of this agreement is immaterial. Had the bill been in existence before the agreement, the usury between *Wau* and *White* would not have vitiated it in the hands of the plaintiff; but the agreement was the cause of its formation. If a bill of exchange must be valid, because the parties to it cannot be proved to have had notice of the occasion for drawing it and the purposes to which it is to be applied, this would be an easy receipt for evading the statutes of usury.

The jury, however, disbelieved *Wau*, and found for the plaintiff.

The witness called to prove notice on the defendant of the bill said, that on the day it became due he left a written notice of its having been dishonoured at the defendant's house.

Second in evidence
by giving
in of a written
notice of the dis-
honour of a bill of
exchange, with-
out notice to
produce it.

LE BLANC, J. after argument ruled, that secondary evidence of the content of this notice, might be given, without a notice to produce it, and compared it to a notice to *qam*. (a)

Topping and *Copley* for the plaintiff.

Garrow and *Park* for the defendant. (b)

[*Attorneys, Annsby and Stephen.*]

(a) *Vide Philipson v. Chase, ante 110.*

(b) In the ensuing term a motion was made to set aside the verdict in this case as contrary to evidence, but the Judge's ruling at nisi prius was not questioned.

Saturday,
March 2.

LINDO v. UNSWORTH.

The holder of a bill of exchange is excused for not giving notice of its dishonour in the usual time, by the day on which he should regularly have given the notice being a public festival during which he is strictly forbidden by his religion to attend to any secular affairs.

THIS was an action by the indorsee against the drawer of a bill of exchange, which became due and was dishonoured on Saturday the 6th day of October last.

It was then in the hands of *Messrs. Hoare & Co.*, the plaintiff's bankers. They, in the usual way, gave it to a notary, who returned it to them, noted on the morning of Monday the 8th. The same day the bankers sent to give notice of the dishonour of the bill to the plaintiff; but he being by religion a *Jew*, and this, as the witnesses stated being of all celebrated throughout the year, the greatest Jewish festival, during which it is unlawful for persons of that persuasion to attend to any sort of business, the plaintiff's counting house was shut, and there was no way to communicate notice to him of the dishonour of the bill till after the post had been dispatched. On the 9th he sent off a letter by the post, giving notice of the dishonour of the bill, addressed to the defendant at Lancaster.

Parke, contended on the authority of *Scott v. Lifford*, 1 *Campb.* 246, and *Smith v. Mullet*, ante 208, that the notice on the 9th was sufficient.

Topping, contra, observed, that in these cases the parties all lived close to each other; that it was more important

Important a notice should be given early which had to travel to a distance; and that the plaintiff was here bound to have sent off a letter containing notice, by the post of the 8th.

1811.

Lynsdo
v.
UNSWORTH.

Lord ELLENBOROUGH — I think the plaintiff was excused from giving notice on the 8th, upon the score of his religion. The law required him to give notice with reasonable diligence, and I think he did so if he sent off the letter as soon as he could after the termination of the festival, during which he was absolutely forbid to attend to secular affairs. The law merchant respects the religion of different people. For this reason, we are not obliged to give notice of the dishonour of a bill on our Sunday. But it was equally impossible for the defendant to give this notice on the 8th of October. The letter sent off on the 9th is therefore sufficient.

Verdict for the plaintiff.

Parke and Marryat for the plaintiff.

Topping and Richardson for the defendant.

[*Attorneys, Swain and Blackstock.*]

Stat. 39 & 40 Geo. 3. c. 42., or Christmas day; but this seems
“ for the better observance of to have been so at common law
Good Friday,” enacts, that with and by the custom of merchants,
respect to bills of exchange, and *Ride Tassel v. Lewis*, 1 Ld.
promissory notes, *Good Friday* Raym. 743.
shall be considered like a Sunday

Tuesday,
March 5.

An averment in a declaration that A. B. & Co. accepted a bill of exchange according to the usage and custom of merchants, is supported by evidence that the bill was accepted by C. D., their authorized agent, thus:

"For A. B. & Co. C. D."

HEYS v. HESELTINE and Another.

ACTION against the acceptors of a bill of exchange.

The declaration alleged generally, that the defendants accepted the bill according to the usage and custom of merchants.

The bill was in fact accepted by an authorized agent of the defendants, in the following form: "*For Heseltine & Co., John Wilson.*"

Park objected that this was a variance, and that the declaration should have averred that the defendants accepted the bill "*by one John Wilson, their agent in that behalf.*"

Lord ELLENBOROUGH. If the defendants accepted the bill by an agent, in contemplation of law, they accepted it themselves; and it is a general rule in pleading, that facts may be stated according to their legal effect. I think the evidence in this instance supports the declaration.

The defendants had a verdict on the merits.

Garrow, Topping and Campbell for the plaintiff.

Park

Park and Abbott for the defendants.

[Attorneys, *Hurd and Welch*.]

1811.

HEY
v.
HISELTINE
and Another.

Vide Helmsley v. Loader, *ante* 450, and the cases there referred to.

EYRE v. PALSGRAVE.

Tuesday,
March 5.

ACTION on a policy of insurance from *Riga* to *Hull*, dated 7th August 1810. The ship was captured in the *Belt*, on her way home, by a Danish privateer.

The following was the only evidence adduced, to shew that there had been a licence to legalize the voyage.

The captain, who is a foreigner, stated, that when the privateer was approaching, he sunk (amongst other documents) a paper which he understood to be a *British* licence, and which he had received in *London* from Mr. *La Marche*.

This gentleman being called, said, he had read over the paper given by him to the captain, and believed it to be a regular licence for the voyage in question. However, he had not procured it from

When a ship insured is captured in a voyage to an enemy's country, and the British licence legalizing the voyage is lost, to shew that she had such a licence, it is necessary to prove the loss of the paper purporting to be a licence put on board the ship, and to produce examined copies of the order in council for granting the licence, and of the copy of the licence preserved in the secretary of state's office.

1811.

BIRK

v.

PALSGRAVE.

secretary of state himself, but had received it from a Mr. *Eames*, of the house of *Eames, Muller, & Co.*

Parke, for the plaintiff, contended, that the licence being lost, this was secondary evidence of its contents to go to the jury.

The *Attorney General, contra*, insisted, that the order in council should be produced, authorising the secretary of state to grant the licence, and the copy of the licence preserved in the secretary of state's office. At common law, a licence to trade with the enemy could only be granted under the great seal. By 48 Geo. 3. c. 126, upon an order in council being made for that purpose, the secretary of state was authorised to grant these licences. But the order in council must be proved, to shew the validity of the licence.

Lord ELLENBOROUGH.—If the objection is taken I must decide that this evidence is insufficient. At present we have no proof of a licence having ever issued. All we know is, that *La Marche* delivered a paper to the captain, which he had received as a licensee from another individual. I hope that for the future, attorneys in cases of this sort will come prepared with the proper evidence to shew the voyage to be legal. I do not require the production of the council books. On the contrary, it may be dangerous to remove them from the office where they are deposited; and I shall hold it quite sufficient to produce an examined copy of the order relied upon. For the same reason it is unnecessary to produce the licence

cence preserved in the secretary of state's office. Let the plaintiff prove that the licence put on board the ship is lost, and produce examined copies of the order in council and of the licence in the secretary of state's office. I trust that all concerned will take notice of the rule now laid down. The present plaintiff must be

1811.

EYRE
v.
PALSGRAVE.

Nonsuited.

Parke and *Scarlett* for the plaintiff.

The *Attorney General* and *Marryat* for the defendant.

[*Attorneys, Rosser and Bourdillon.*]

Vide Kensington v. Inghs. 8 East 273. *Rhind v. Wilkinson,*
2 Taunt. 237.

~~S~~MEDLEY q. t. v. ROBERTS and another.

DEBT for penalties on the statute of usury.

Thursday,
March 7.

The transaction alleged to be usurious took place between the defendants and one *Pudding*, and was sworn by him to have been as follows:

Sembler, that lending money on continuation is usurious.

On the 13th of December, *Pudding* owed the defendants, who are stock brokers, £8237. 10s. and they proposed to him to continue the loan of this money

1811.

SMYDLEY
v.
ROBERTS
and Another.

till the 10th of January following, on his pledging £10,000 omnium with them, on which they were to advance an instalment of £1000 on the 15th of December, and which they were to return on the 10th of January, at 3-8ths higher than the price on the 13th of December. He agreed to the proposal, and it was carried into effect. He accordingly, on the 10th of January, upon receiving back his scrip receipts for the £10,000 omnium, gave them a cheque for £9275, which was duly paid. This *total* was composed of £8237. 10s. the original debt; the £1060 instalment; and £37. 10s. for the 3-8ths;—which last sum is more than at the rate of £5 per cent. per annum for the money borne.—The credit of the witness was considerably shaken in cross examination, particularly by the account he gave of the manner in which this action had been commenced. No very satisfactory explanation could be obtained of the nature and consequences of the contract between the parties, when money is thus lent on continuation.

Lord ELLENBOROUGH said, that as far as could be discerned from the evidence before the court, there appeared to be no contingency in the transaction, and whether the market rises or falls, the lender must recover his principal, together with the advance upon the price of the omnium. If so, where that advance is above the legal rate of interest, the transaction is undoubtedly usurious; and in this case, if the witness was believed, there must be a verdict for the plaintiff. But his lordship pointed out the improbability of several parts of *Piddings*' testimony, and

chiefly left it to the jury, upon the credit which he deserved.

The jury immediately found for the defendants.

The *Attorney General, Garrow and Comyn* for the plaintiff.

Park, Marryat and Gurney for the defendant.

But the loan of money produced by the sale of stock, on an agreement that the borrower shall replace this stock on a certain day, or repay the money on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed *5*l.* per cent.*

Tate *v.* Welling, 3 T. R. 551. So where A. owing B. so much money on a given day as would have purchased a given quantity

of stock, B. took a bond from A., conditioned for the transfer to B. on a future day of the same quantity of stock, and for the payment in the meantime of such interest as the same would have produced: this was held neither to be usurious, nor within the stock-jobbing acts. Maldock *v.* Rumball, 8 East 304. *Vide etiam Sanders v. Kentish,* 8 T. R. 162. In these cases, from the fall of stock, a loss might have accrued to the lender.

1811.

SMEDLEY
v.
ROBERTS.
and Another.

Thursday,
March 7.

MULLER v. THOMPSON.

A voyage to a Prussian port is not illegal as being a trading with an enemy, although our commerce is entirely excluded from the ports of Prussia, and there be no diplomatic intercourse between the two countries.—A policy of insurance is not vitiated by giving leave to the ship to proceed to any port in a particular sea in which there are both hostile and neutral ports unless it can be shewn that it was intended the ship should in fact proceed to one of the former.—An insurance is declared to be “on the cargo, being 1031 hds. wine.” This does not amount to warranty that the wine constitutes the whole cargo, and that no other goods shall be taken on board.

THIS was an action on a policy of insurance, dated 17th April 1810, “at and from *Gottenburgh*, or from off Gottenburgh (if the ship should have proceeded without entering that port) to *Konigsberg*, with leave to carry simulated papers, to seek, join and exchange convoys, and to proceed to any port or ports in the *Baltic* or *Gulph of Finland*, in the event of the ship not being admitted into the port of destination.”

The insurance was declared to be “on the cargo, being 1031 hogsheads wine, valued at £16 per hogshead.”

The ship was *Danish*, and brought a cargo of wines from *Bourdeaux*. These she unloaded and re-loaded at *Chatham*. The captain likewise put on board there eight cases of British manufactured goods, which, together with his British papers, he stowed away in the bottom of the hold. The ship then proceeded on her ulterior voyage, and after touching at *Gottenburgh* she was captured by a French privateer, and carried into *Dantzic*. At first there appeared no evidence against her, and she would have escaped, had not the British goods and papers been afterwards discovered. But by means of them she was condemned with her whole cargo.

Garrow, for the underwriters, first objected that the voyage was illegal, as our ships are excluded from *Konigsberg*, which must therefore be considered an enemy's port.

1811:
MULLER
v.
THOMPSON.

Lord ELLENBOROUGH.—We are treated very discourteously there, but it is not to be considered an enemy's port. *Konigsberg* belongs to *Prussia*.—We are placed in a strange anomalous situation with regard to that country and others on the continent; but it is not that of war. We have published no declaration of war against *Prussia*; we have not issued letters of marque and reprisals; we have not done any act of hostility. Therefore, though the relations of amity are not very strong between us, yet we are not at war with *Prussia*, and a voyage from England to a Prussian port is not illegal.

Garrow then objected, that there being various ports in the Baltic and Gulph of Finland, which at that time were decidedly hostile to this country, a policy giving leave to proceed to any of these, was illegal on the face of it.

Lord ELLENBOROUGH.—You must shew that the parties had it in contemplation, that the ship should proceed to an enemy's port in the Baltic or Gulph of Finland. There being neutral ports within these limits, I will presume that the leave was meant to apply to such only, till the contrary is proved (*a*).

(*a*) *Vide Barker v. Blakes*, 9 East 283.

1811.

MULLER
v.
THOMPSON.

Garrow, lastly insisted, that the underwriters were charged by the 8 cases of British manufactured goods, taken on board at *Chatham*. The insurance was declared to be “on the cargo, *being* 1031 hogsheads wine.” This amounted to a warranty, that the whole cargo consisted of wine, and that no other goods should be taken on board.

Lord ELLENBOROUGH.—I think the *cargo* does not mean the *whole cargo*, but merely that the insurance shall attach upon that part of the cargo which consists of the 1031 hogsheads of wine. There was no warranty or representation that this was French wine. The risk was not increased by other goods being put on board. The ship was not declared to be of any particular nation. There was nothing illegal in sending British goods to a Prussian port, and I do not think it was any contravention of the terms of the policy.

Verdict for the plaintiff.

In the ensuing term, *Garrow* applied to set aside the verdict, on the ground of there being a warranty that the cargo should consist of nothing besides wines. But the Court refused a rule to shew cause.

The *Attorney General*, *Park* and *Holroyd* for the plaintiff.

Garrow, *Topping* and *Scarlett* for the defendant.

[*Attorneys, Gatty and Blunt.*]

JARMAN v. COAPE.

Friday,
March 8.

THIS was an action on a policy of insurance, "at and from London to any port or ports, place or places of discharge, all or any, on the continent, with liberty to touch at Heligoland, and during any time she might stay there, and with leave to carry simulated papers and a British licence, *free of capture and seizure in her port or ports of discharge.*

The ship having touched at *Heligoland*, there took in a supercargo and proceeded to the river *Jade*.—When she had entered the river and come to a place called *Hockzee*, the supercargo went on shore, for the purpose of going to *Varrel*, a town higher up the river, to announce her arrival to the correspondent of the shipper there, who had authority to give orders where the goods should be landed. He did not himself return to the ship, but sent a messenger to *Hockzee*,—with what orders did not appear. The ship in the mean time had moved higher up the river; and when she was about 15 English miles from *Varrel*, where the river is between two and three miles broad, she was seized by the *Douanniers* from that port, and being carried in there, she was afterwards condemned. Ships trading to *Varrel*, in the ordinary course of things, never unload where the ship in question lay when she was seized. If large, they proceed to a creek near *Eckwarden*, called

If by a policy of insurance the ship is warranted "free of capture, and seizure in her port or ports of discharge," and she is taken in an open river not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge within the meaning of the policy, and the underwriters are not liable for the loss.

Varrel

1811.
JARMAN
v.
COAPE.

Varrel Roads; if small, they enter a basin near the town called the *Varrel Zeel*. It was suggested, however, although no direct proof was offered one way or the other, that since the French douaniers have been established at *Varrel*, it has been usual for ships from *London* not to enter the *Roads* or the *Zeel*, but on a private signal being given, to discharge their cargoes into lighters in the *Jade*, or in sluices by the side of the river.

The *Attorney General* for the plaintiff contended, that as the ship, when she was seized, was not within the port of *Varrel*, nor in any other port, the loss did not come within the warranty; and he relied upon *Baring v. Vaux*, ante 541, where his Lordship had put it to the jury to say, in what port the ship lay when she was taken at anchor off *Goree*.

Lord ELLENBOROUGH.—To discharge the underwriters from their liability, the ship, when she was taken, must have been in some port within the meaning of the warranty. The words of the warranty here are, not free of capture or seizure ~~in any port~~ generally, as in *Baring v. Vaux*; but, “free of capture or seizure *in her port or ports of discharge*.”—If, when she was seized by the *douaniers*, it was her intention to unload her cargo on the adjacent banks of the *Jade* the first favourable opportunity, I think she may be considered as within the limits of her ports of discharge, although ships, when no danger is apprehended, do not usually unload there. It must have been in the contemplation of both the contracting parties, that the goods were more likely

to be landed in a clandestine manner than in a public harbour, and a seizure of this sort seems to be exactly the risk against which the underwriters meant to guard themselves.

1811.
JARMAN
v.
COAPE.

The Jury, without hesitation, found for the defendant.

In the ensuing term, the *Attorney General* applied for a new trial, on the ground that the ship, when she was taken, could not be considered in her port of discharge; but the Court thought, that this was a matter of fact which had been properly left to the jury, who had come to a right conclusion.

Rule to shew cause was refused.

The *Attorney General* and *Marryat* for the plaintiff.

Park and *Scarlett* for the defendant.

[*Attorneys, Dawes and Blunt.*]

Xade Brown v. Tiepney, 1 Taunt. 517.

MOORSHAM

Friday,
March 1.

If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to shew, that this would be more or less than a fair compensation for the detention.

MOORSOM v. BELL.

THIS was an action of covenant upon a charter-party, for detaining a ship beyond the stipulated time of demurrage.

By the charter-party, 50 lay days were allowed for loading and unloading, &c. and the freighter was at liberty to keep her ten days more upon demurrage, at eight guineas a day. In fact, she was kept in the London docks 65 days beyond the ten, before she was unloaded. The plaintiff claimed a compensation for this extended time, at the rate of eight guineas a day. The defendant paid money into Court at the rate of £4 a day.

The plaintiff's crew consisted of 12 persons. Of these he discharged nine on entering the docks, and while the ship was detained, he had only to ~~support~~ the others and four custom-house officers.

Lord ELLENBOROUGH.—If a ship is detained beyond her days of demurrage, *prima facie* the sum allowed as demurrage shall be taken as the measure of compensation. This is a rule both of convenience and of justice. But it is open to the ship-owner to shew, that more damage has been sustained, and to the freighter to shew, there has been less than would thus be compensated. In this case, no more than the stipulated

pulated allowance for the demurrage days is claimed by the owner, and the jury will say whether he is entitled to so much.

The jury found for the plaintiff at the rate of £7 a day.

The *Attorney General*, *Garrow* and *Richardson* for the plaintiff.

Park and *Taddy* for the defendant.

[*Attorneys, Williams and Palmer.*]

Vide Randal v. Lynch, ante 356.

1811.

Moorsom
v.
Bell.

NEWSOME *v.* WILLIAM COLES, GEORGE COLES, and CHARLES COLES.

Saturday,
March 9.

THIS was an action against the three defendants as acceptor's of a bill of exchange, in the following form:—

If after a dissolution of a partnership, and notice of this published in the London Gazette, and sent round

to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against him doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership.

VOL. II.

S S.

"London,

1811.

NEWSOME

v.

COLES
and Other.

" £2830. 16s.

" London, 20th March, 1810.

" Four months after date pay to my order two
 " thousand eight hundred and thirty pounds sixteen
 " shillings, value received.

" H. Vos.

" Messrs. Thos. Coles & Sons,
 " London.

(Indorsed)

" H. Vos.

" Accepted, Thos. Coles & Sons,
 " At Messrs. Brickwoods & Co."

Thomas Coles and his three sons, the present defendants, formerly carried on business in partnership together, under the firm of "*Thomas Coles and Sons.*" The father died in 1805, and the three sons continued to carry on business under the same firm, till the year 1808. *George* and *Charles* then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the *London Gazette*, and was sent round to the correspondents of the house. *William Coles* continued the old business by himself, under the old firm, and accepted the bill in question, drawn upon *Messrs. Thomas Coles & Sons.* The plaintiff had not had any dealings with the partnership of "*Thomas Coles & Sons.*" when composed of the three brothers; and when he took the bill in question, he did not know that that partnership had been dissolved.

The

The *Attorney General* having opened these facts as counsel for the plaintiff, contended that *George* and *Charles Coles* were liable to him as partners with their brother *William*. They must be taken to have authorized him still to hold them out as partners to the world. If they consented to the old firm being used by him, they were clearly liable as much as if the names of both had been mentioned by their authority, and their consent must be presumed from their never having attempted to prevent him from using the old firm. Had they applied to the great seal, as it was their duty to do, the Chancellor would at once have granted an injunction against one partner drawing or accepting bills in the partnership firm after a dissolution of the partnership.

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VS
NEWSOME
v.
COLES
and Others.

Lord ELLENBOROUGH.-- It is not pretended that the defendants *George* or *Charles Coles* ever interfered with the business carried on by *William* after the dissolution of the partnership, or by any act whatsoever authorized him to use the firm under which they had traded together. I am therefore of opinion that they are not liable for that firm being used by him without their authority. Ample notice had been given of the dissolution of the partnership; and after that, it was the duty of persons taking securities in the name of *Thomas Coles & Sons*, to enquire who were designated by that firm. The plaintiff might not know of the dissolution, but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not bound to apply to the Lord Chancellor for an injunction, or to take any notice of the

1811.

NLSOME
v.
COTTS
and Others.

firm which their brother might happen to use. They were discharged from all liability for his acts by the dissolution of the partnership, and the notice which was communicated of that event. The plaintiff must be called.

The Attorney General, Onslow, Serjeant, and Comyn for the plaintiff.

Garrow, Park and Cowley for the defendants.

It has been held, that notice of the dissolution of partnership, published in the *Gazette*, is sufficient as to all who had no dealings with the partnership, Godfrey v. Turnbull, 1 Esp. N. P.C. 371.; although the partners remain liable for the acts of each

other, to those who had been correspondents or customers of the house, till the latter have received a particular notice of the dissolution of partnership. Graham v. Hope, Peak. Cas. 154. Gorham v. Thompson, *Ib.* 42.

Saturday,
March 9.

ARCANGELO v. THOMPSON.

A count on a policy of insurance laying the loss by capture, is sustained by evidence, that the ship was cap-

ACTION on a policy of insurance, dated in the year 1797, on goods by a ship *warranted Danish*, at and from Trieste to Hamburg.

Although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff might have recovered under a count laying the loss by the *barratry* of the master.

To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port.

The production of a letter dated abroad, and addressed to J. S. in England, with the English ship-letter post mark upon it, which directed a policy to be effected, is sufficient to prove that J. S. was "the person residing in Great Britain, who received the order for and effected such policy."

The

The loss was laid by *capture*.

1811.

The ship was captured by a French privateer, carried into *Venice*, and there condemned together with her cargo. This appeared to have happened through an agreement between the captain of the ship and the captain of the privateer,

ARCANGELO
v.
THOMPSON.

Best, Serjeant, for the defendant, objected that the loss was not proved as laid, and had not arisen from an hostile capture, but from the barratry of the master.

Lord ELLENBOROUGH.—The plaintiff was no party to the barratrous agreement under which the ship was taken. As to him, the loss actually arose from the capture. He might have recovered under a count laying the loss by barratry; but as the ship was actually taken by a French privateer, I think this declaration, laying the loss by capture, is sustained by the evidence (*a*).

To prove the ship to be a *Dane* the evidence was, that the captain when at *Trieste* addressed himself to the *Danish* consul there; that when he left that port he carried *Danish* colours, and that when he was brought into *Venice*, he had still the same colours with the French flag flying over them.

(*a*) *Vide Heyman v. Parish, ante*, 149.

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—
ARCANGELO
v.
THOMPSON.

Best, Serjeant, contended that the acts of the captain were no evidence to shew to what country the ship belonged. He might have various reasons for passing as a *Dane*, although he belonged to one of the belligerent powers. Therefore, some documents should be produced, or some witness called to prove that the warranty had been complied with.

Lord ELLISBOROUGH. I think the acts of the captain are *prima facie* evidence for the owner of the goods, to shew to what nation the ship belonged.—The circumstance of the ship carrying *Danish* colours when she was captured, would have very little weight, as in the moment of danger any strange flag might be hoisted for the purpose of deception; but from the captain having carried *Danish* colours when he sailed away from the port of *Trieste*, and having there addressed himself to the *Danish* consul, and conducted himself as the master of a *Danish* ship would have done. I conceive there is fair ground for the jury to infer that the ship really was *Danish*, according to the warranty.

The policy was in the name of *S. Levy*, who was averred by the declaration to have been "the person residing in Great Britain, who received the order for and effected such policy (a)."

To prove the *order*, the plaintiff's counsel gave in evidence a letter from him, dated at *Trieste*, addressed

(a) Stat. 28 G. 3. c. 56.

to *Levy* in *London*, and having upon it the English ship-letter post mark, with the date of 1797.

Lord Ellenborough held, after argument, that this was sufficient evidence of the receipt of the order by *Levy*, before the effecting of the policy.

And the plaintiff had a verdict (*a*).

The *Attorney General*, *Garraway* and *Marryat* for the plaintiff.

Best, Serjeant, and *Carr* for the defendant.

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ARCANGELO
v.
THOMPSON.

(*a*) But in a criminal case, where or when a letter was put the post-mark upon a letter does not seem to be evidence to prove son, 1 C. & P. 215.

WILSON v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Sunday,
March 9.

THIS was an action on a policy of insurance, at and from London, on wheat.

The policy contained the usual warranty, "from all average on corn, unless general."

The facts opened were, that when the ship was weighing anchor to proceed with a convoy from the *Downs*, another vessel ran foul of her, carried away

The Royal Exchange Assurance Company is liable for a total loss upon a cargo of corn, where the ship from the ports insured against, becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the cargo to its port of destination.

1811.

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v.
THE ROYAL
EXCHANGE
ASSURANCE
COMPANY.

her bowsprit, and damaged her hull. She was in consequence obliged to go into *Dover*, and in entering that harbour she received further damage by striking on the bar. A survey being made, it was found that she was quite unfit to continue the voyage, and that she could not be repaired without an expence much greater than her entire value. The cargo being inspected, was found considerably injured from the water in her hold. The whole, consisting of 1160 quarters, was landed in a few days. Of these 400 quarters only were dry, 700 quarters were wetted, but were kiln-dried, and the residue was entirely spoiled. No other ship could be found to carry the wheat on to *Lisbon*, and the assured gave regular notice of abandonment.

The *Attorney General* argued, that under those circumstances the plaintiff was entitled to recover as for a total loss, the voyage being lost. And he relied upon the case of *Manning v. Newnham*, of which he read the subjoined note taken by himself (a).

Where a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, this is a *total loss* of ship, cargo and freight, however inconsiderable the damage sustained may be, because the voyage in contemplation is lost.

Lord

(a) *Manning v. Newnham*. according to the warranty ; soon received damage in a gale ; was ordered back by the commander Tim. 1782. of the convoy, as the best thing Action on a policy. to be done : was there surveyed, Q. Whether an average or a total loss ? and declared unfit to proceed to The jury found it *total*. It appeared that the ship, a London ; and could not be re-Dutch prize, laden with sugar paired at Tortola, nor at St. at Surinam, sailed from Tortola Thomas's, which is the next place.

LORD ELLENBOROUGH.—I accede to that case; and if it shall be proved, that the voyage here was not worth pursuing, and that there were no means of pur-

suing,

1811.

WILSON
v.
The ROYAL
EXCHANGE
ASSURANCE
COMPANY.

place. No ship could be had at Tortola to bring the whole cargo or the greater part of it. The cargo did not appear to have received any special damage, and was sold for 700*l.* within the sum in the policy, which was above 12,000*l.* Some sugars might have been sent, and there would have been many thousand pounds profit in London. The owners purchased 2-3ds of the cargo, which was not yet arrived. The insurance was warranted free from *particulars average*.

LORD MANSFIELD. At the trial several prejudices struck me. A jealousy arises, (especially in cases of this kind, where the insured takes particular average on himself) of permitting the insured to turn an average into a total loss.

There are three objects of the insurance, the ship, the cargo, and the freight. The last is allowed to be a total loss; but a question arises upon the cargo. I left it to the Jury rather as a partial loss. They found it total. The same prejudices have struck

me since the trial; but upon consideration we all agree now that the Jury have done right. If the voyage in contemplation is lost, or is not worth pursuing, this is a total loss. Here the voyage in contemplation is of a large Dutch ship, loaded with sugar, at Surinam, to come from Tortola to London. Much depends upon the price of the goods at the time. Here she is condemned as totally unfit to proceed; and there is no ship to be had. Must the insured wait? There is no pretence that ships enough to take the cargo could have been had. Even what was bought is not yet arrived in England.

If the voyage were continued in another ship, there ought to be freight *pro rata*, but that is allowed to be wholly lost. The point of the insurance is not the ship alone but her arrival in London.

We are therefore all of opinion that this is a total loss. It agrees with all the cases, and we are afraid much confusion will

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WILSON

suing it I think this must be considered a total and not an average loss.

The Royal
Exchange
Assurance
Company.

It appeared, however, that although the ship insured was so much shattered as to be unable to continue the voyage, there was a brig lying in *Dover* harbour at the time, in which the wheat might have been sent to *Lisbon*; for which reason, as well as on account of some irregularity in the notice of abandonment, Lord ELLENBOROUGH was clearly of opinion, that the action could not be maintained.

A policy of insurance on money lent to the Captain payable out of the freight, is illegal; and the premium cannot be recovered back from the underwriters.

The plaintiff also declared upon another policy on £300. lent to the *Captain*, payable out of the freight. But

Lord ELLENBOROUGH held, that this was not an insurable interest; and the policy being illegal on the face of it, that the premium could not be recovered back.

Plaintiff nonsuited.

The *Attorney General*, *Lawes* and *Tuddy*, for the plaintiff.

will arise from too great nicety in examining what is a total loss of a voyage.

Rule for a new trial discharged.
Idle Park, 221. Marshall,
585.

Garrow

Garrow and Bosanquet for the defendant.

1811.

Jude Webster a. De Tastet, 7^oT. R. 157.

WILLSON
v.
THE ROYAL
EXCHANGE
ASSURANCE
COMPANY.

MOORSOM v. GREGAVES AND OTHERS.

Tuesday,
April 30.

THIS was an action on a charter-party, whereby the plaintiff let the ship Crown to the defendants, for a voyage to any port or ports in *St. Domingo* and back to London; and the defendants were to pay the sum of £6300 freight for the first 8 months, "and if she should take up longer in completing the said voyage, then at the rate of 47s. 6d. per ton per month, for such further time as she should be so employed or engaged.

The ship went first to *Port au Prince*, where she unloaded a part of her outward cargo. The supercargo appointed by the defendants then peremptorily ordered her to *Capu Nichola Mole.* This place being at that time occupied by *General Petion*, was blockaded by *General Christophe*, and the ship was taken by one of his cruisers for a breach of blockade, and carried into *Port au Paix*. Here her cargo was confiscated, and she was detained between five and six weeks. At the end of that time she was liberated, and returned to *Port au Prince*. She afterwards took in a homeward cargo, which she brought

A ship let to freight by the month in attempting to enter a blockaded port by order of the freighters, is seized and her cargo condemned; but being afterwards released, takes in other goods, and delivers them to the freighters, according to the charter party: Held, that there was no suspension of the freight during the detention of the ship.

to

1811.

Moorsom

v.

Greaves
and Others,

to London and delivered to the defendants, having been out upon the adventure about 13 months.

The question was, whether the freighters were liable for the time the ship was detained at *Part au Paix*?

The *Attorney General* contended, that she could not be considered as then performing the voyage, or *employed and engaged* by the defendants.— But—

Lord ELLENBOROUGH thought that as the ship was taken in proceeding to *Cape Nichola Mole*, by order of the supercargo, the voyage was never discontinued, and the freighters were answerable for the subsequent detention, in the same manner as if it had arisen from contrary winds or from an embargo.

The plaintiffs had a verdict for their whole demand.

Garrow, Marryat, and Campbell for the plaintiff.

The *Attorney General* and *Park* for the defendants.

[*Attorneys, Nind, and Steam & Co.*]

Vide Havelock v. Geddes, 10 East, 555. *Randall v. Lynch*, ante 352.

COURT

COURT OF COMMON PLEAS.

SECOND SITTINGS IN TERM AT WESTMINSTER.

WARRAIL v. CLARKE.

Friday,
February 1.

TRESPASS for breaking and entering the plaintiff's house and expelling him from the possession thereof.

Plea, that the defendant demised the house in question to the plaintiff for a term of years, under a condition that if the plaintiff should hold an auction on the premises, it should be lawful for the defendant to re-enter; that before the time when, &c. the plaintiff had held an auction on the premises; wherefore the defendant entered and expelled him, as he lawfully might, for the cause aforesaid.

If to trespass by a tenant against a landlord for turning him out of possession, the defendant pleads a fact by which the lease was forfeited, and the plaintiff replies generally *de injuria*; when the fact is proved by which the lease was forfeited, the plaintiff cannot give in evidence a waiver of the forfeiture; but he ought to have replied this specially, in avoidance of the plea.

Replication, admitting the demise, *de injuria sua propria absque residuo cause*.

The facts proved were, that the defendant had committed the trespass; that the plaintiff had previously held an auction on the premises; and that between

1811.

WARRALL
v.
CLARKE.

between the auction and the trespass, the defendant, with notice of the cause of forfeiture, had accepted rent from the plaintiff.

The plaintiff's counsel contended, that the issue must be found for him, as the acceptance of rent was a waiver of the forfeiture, and had the effect of entirely doing away with it, so that the defendant's right of entry was gone, and he was a trespasser in coming upon the premises.—But—

Sir JAMES MANSFIELD, C. J. held, that defendant had fully substantiated that part of this plea which was in issue, by proving that the auction had been held on the premises, and that a forfeiture had been once incurred. The acceptance of rent was a waiver of the forfeiture, and barred the defendant's right of entry; but this was matter of special replication, and could not be taken advantage of under the *de injuria absque residuo causæ*, which merely put in issue the holding of the auction.

Plaintiff nonsuited.

Shepherd, Serjeant, and *Comyn* for the plaintiff;

Best, Serjeant, for the defendant.

ADJOURNED

ADJOURNED Sittings IN LONDON.

Coram LAWRENCE, J.

WOLF v. SUMMERS.

Thursday,
February 21.

TROVER for a trunk filled with wearing apparel, and a writing desk.

The master of a ship has a lien on the luggage of a passenger for his passage money.

The plaintiff had returned to England from the Brazils in a ship of which the defendant was master. The plaintiff himself came on shore at the first port the ship made in the channel, and travelled to London by land. The articles in question, which were part of his luggage, he left behind him to come round with the ship. When she arrived in the River, he sent to demand them; but the defendant refused to deliver them up till he should be paid £15.—saying, that the plaintiff was to pay £30. for his passage, and had then paid only one-half of that sum.

Shepherd, Serjeant, contended, that even although £15. for the plaintiff's passage was due, the defendant had no right to detain his luggage for that sum. The trunk and writing desk were not articles of merchandize for which freight was due. They were mere accessaries to the plaintiff's person; and it was for carrying the plaintiff himself that the money was demandable. The defendant, therefore, had no lien upon .

1811.
WOLFE
SUMMERS. upon them. It might as well be said, that the plaintiff himself might have been stopped, or that the clothes he wore might have been stripped from his body.

LAWRENCE J. The master of a ship has certainly no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but I think the lien does extend to any other property he may have on board. A certain sum is agreed to be given for carrying the man and the luggage. I think the captain has a lien for this upon the luggage. In detaining that, there is no greater inconvenience than in the common case of goods and merchandize carried on freight; and there is no reason why there should not be the same lien for the recovery of passage money as for the recovery of freight. I conceive the defendant had a right to say to the plaintiff, " You shall not have your things till you pay me what is due for bringing them and you from Brazil;" and that in refusing to deliver them up, he was not guilty of any tortious conversion.

Evidence was given that £30. was a reasonable sum for the plaintiff's passage in the steerage of the ship, and the defendant had a verdict.

Shepherd, Serjeant, and Comyn for the plaintiff.

Best, Serjeant for the defendant.

[Attorneys, *Fitzgerald and West.*.]

See all the authorities collected as to the lien of the master of a ship, *Abb. Shipp.* Part III. c. 3. § 11.

HILTON v FAIRCLOUGH.

Saturday,
February 23.

THIS was an action against the indorser of a bill of exchange, which became due on the 28th of February last:

On that day, it was presented for payment to the acceptor, who resides in *Gerard Street*, and next day, at 12 o'clock, the plaintiff put into a receiving house of the *two-penny post*, a letter, containing notice of the dishonour of the bill, addressed to the defendant at his house in *Panton Street*.

Best, Serjeant, for the defendant, contended, that this was insufficient evidence of notice.

LAWRENCE J. It has been decided in a case in *Mr. Campbell's Reports*, that a notice sent by the two-penny post is sufficient (*a*).

Best, Serjeant, said, the party sending the notice in that case resided in *London*, and the party to whom the notice was sent at *Shadwell*, an adjacent village. They could not be considered as living in the same town; and although under such circumstances a

(a) *Scott v. Lifford*, 1 Camp. 246

1811.

~~L. TON~~
FARRELL. notice by the two-penny post might be sufficient, there was no reason why the uncertainty, delay and expense of this conveyance should be submitted to, where the parties lived within a few minutes' walk of one another.

LAWRENCE J. The rule once being laid down, that a notice by the two-penny post is sufficient, I cannot enter into any consideration of the distance at which the parties live asunder: the notice is good within the limits of the twopenny post. Here the letter being put into the receiving house about noon of the 1st of March, we know that it must have reached its destination the same evening, and the defendant had information from the holder of the bill of its dishonour, the day after it became due, which is all he could require.

Verdict for the plaintiff.

Vaughan, Serjeant, and *Taddy* for the plaintiff.

Best, Serjeant, and *Comyn* for the defendant.

[*Attorneys, Nettleship and Cobb.*]

Vide Smith, v. Mullet, ante 208.

FITZGERALD.

FITZGERALD v. ELSLL.

Saturday,
February 23.

IN this case it became necessary to prove, that the defendant had executed an indenture of apprenticeship, by which a son of the plaintiff was bound to him under the usual covenants.

The subscribing witness being called for this purpose, swore that the boy executed it in his presence; but that he had never seen it executed by the defendant.

If the attesting witness to a deed says that he did not see it executed, it may be proved by evidence of the hand-writing of the party.

Shepherd, Serjeant, for the plaintiff, then proposed to call another witness to prove the defendant's hand writing to the indenture, and mentioned a case before Lord ~~ALVYLLY~~, where the subscribing witness to a deed having denied that he saw it executed, evidence was admitted of the hand-writing of the parties.

Best, Serjeant, *contra*, insisted, that as this indenture professed to be executed by the defendant in the presence of the attesting witness, it could be proved by the attesting witness, and him only. Where there appears to be an attesting witness to a deed, the admission of the party is insufficient to prove it. Therefore, if the attesting witness says, that he did not see the deed executed, it must be taken never to have been executed with due formality, and as not binding on the party although he may have signed it.

1811.

FITZGERALD
v.
ELSEE.

LAWRENCE, J. If the attesting witness swears, that he did not see the deed executed, I think it is then to be treated as if there were no attesting witness, and evidence of the hand-writing of the party is sufficient proof of its execution.

Evidence of the defendant's hand-writing to the indenture was accordingly admitted, and the plaintiff had a verdict.

Shepherd, Serjeant, and Espinasse for the plaintiff.

Best, Serjeant, for the defendant.

So if the subscribing witness to a promissory note swears that he did not see it drawn, it may be proved by evidence of the hand-writing of the maker.

Lemon v. Dean. Lancaster Lent Assize, 1810. Cor. Le BLANC, J.

Action on a promissory note, which appeared to be witnessed by one Bentley.

Bentley was called, and swore that he did not see the defendant subscribe the note, but the defendant merely desired him to try to write his name upon the paper, and that he did not observe whether any thing was at that time written on it.

Plaintiff's counsel then proposed to call witnesses to prove

the defendant's hand-writing.

Williams objected that there being a 'subscribing witness to the note, who was not incompetent, no other evidence of it could be given. He cited Phipps v. Parker, 1 Camp. 412.

Le BLANC, J.—I will make no observation upon that case. It may be distinguishable, as there the instrument was a deed. But I am quite clear that if the subscribing witness to a note, when called, cannot prove it by reason of his not having seen it drawn, the plaintiff may proceed to prove it by other means.

Vide Fasset v. Brown. Peak. Ccs. 23, Grellier v. Neale, Ib. 146.

OXFORD CIRCUIT.

LENT ASSIZES, 51 GEO. III.

GLOUCESTER.

Coram LAWRENCE, J.

HARRIS v. TIPPETT.

Monday,
March 11.

THIS was an action for not accounting for a pro-missory note given to the defendant to be discounted on behalf of the plaintiff.

A witness for the defendant was asked in cross-examination, whether he had not attempted to dissuade a witness examined for the plaintiff, from attending the trial. He swore positively, *that he had not.*

Dauncey then proposed to call back the other to contradict him.

LAWRENCE, J. That cannot be done. You must take his answer.

T t 3

Dauncey

Any question may be put to a witness in cross-examination, the answer to which may have a tendency to discredit him; but if such a question be collateral to the matter in issue, the answer which the witness gives must be taken as conclusive, and other witnesses cannot be called to contradict him.

1811.
HARRIS
v.
THRETT.

Darcey contended, that for the purpose of discrediting the witness, it was competent to shew, that he had sworn falsely in this instance, and actually had attempted to dissuade the other from attending the trial.

LAWRENCE, J. Had this been a matter in issue, I would have allowed you to call witnesses to contradict what the last witness has sworn, but it is entirely collateral, and you must take his answer. I will permit questions to be put to a witness as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when these questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. No witness can be prepared to support his character as to particular facts, and such collateral inquiries would lead to endless confusion.

Darcey and *Ludlow* for the plaintiff.

Jervis and *Abbott* for the defendant.

LAWRENCE, J. laid down the same rule several times during the circuit; and it seems particularly illustrated by the following case, which occurred at Monmouth. One *Yewin* was indicted for stealing wheat. The principal witness against him was a boy of the name of *Thomas*, his apprentice. LAWRENCE, J. allowed the prisoner's counsel to ask *Thomas* in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said, he would

would be revenged of him and would soon fix him in *Monmouth* goal.—He denied both. The prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him.—Colonel J. ruled, that his answer must be taken as to the former; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced, that they were spoken by the witness.

Vide *Spen Gay v. De Wolff* 7 East 105

KING and Another v. MERIDITH.

Judix.
March 12

ACTION for the price of a quantity of brandy and rum.

A soon as goods
are delivered to
a carrier, they
are at the risk of
the purchaser.
The carrier
is to be paid
by the vendor.

The spirits were delivered by the plaintiffs to a carrier, to be conveyed to the defendant. They were then of the legal proof; but they were under proof when delivered by the carrier to the defendant, and were for that reason seized and condemned by the Excise. *The carrier was to be paid by the plaintiffs.*

Damney for the defendant, contended, that for this reason, the spirits were at the risk of the plaintiff's while in the hands of the carrier, who being paid by them must be considered as their agent.

1811.

HARRIS
v.
TIPPLER.

1811.

KING
and another.

v.

MEREDITH.

LAWRENCE, J. The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him, the property vested in the defendant. The plaintiffs, by paying the carrier, did not become insurers of the spirits while in his hands.

The plaintiffs had a verdict.

Abbott and Ludlow for the plaintiffs.

Dauncey and Wigley for the defendant.

Vide Davis v. James, 5 Burr. 2680. *Brown v. Hodgson*, *ante* 36.

Wednesday,
March 13.

WATHEN Esq. v. Sir E. B. SANDYS, Bart. and the Earl of BERKLEY.

If the candidates at a county election jointly desire the sheriff to erect his tags, to provide poll-clerks, and to retain an a-

sor, prom . to defray the expence thus incurred, they are liable jointly to an action of *indebitatus assumpsi* at his suit upon their joint undertaking, notwithstanding stat. 18 G. 2, c. 18, § 7.

But the sheriff is not entitled to charge the candidates with any part of the expence necessarily incurred by him in executing the writ, and making the return; and for those things expressly ordered by the candidates, they are only bound to pay him a fair remuneration, although he himself may have paid more in subitting to exorbitant charges usually made on such occasions.

Sir

Sir I. B. Sandys pleaded the general issue, and
Lord Berkley suffered judgment by default.

1811.

WATHEN

v.

SANDYS
and Another.

The action was brought by *Paul Wathen*, Esq., late sheriff of Gloucestershire, to recover the expenses he had incurred at the election of a member of parliament, to represent this county in May last, when the two defendants were candidates, and Lord Berkley was returned.

The plaintiff's demand was composed of the following items:—

SHERIFF'S OFFICE.

			£	s.	d.	£	s.	d.
Advertisements	-	-	3	3	0			
Indentures	-	-	2	2	0			
Stamps	-	-	3	10	0			
Under Sheriff	-	-	21	0	0			
County Clerk	-	-	6	6	0			
Bailiff	-	-	2	2	0			
Hall-keeper	-	*	1	0	0			
Filing writ	-	-	1	1	0			
						40	5	0

ASSESSOR.

Mr. _____, retainer and clerk	-	6	6	0
Mr. _____'s fee	-	31	0	0
His clerk	-	21	0	0
Agents' fees	-	1	5	0
Attendances, letters, &c.	-	10	10	0
		308	11	0

BOOTHS.

Erecting booths (sum recovered against the shire by the builder)	-	825	5	0
Painting lists of hundreds	-	1	11	6
Printing do. Parishes	-	1	11	6
Constables guarding booths	-	4	4	0
Three surveyors	-	21	0	0
Printing poll-books	-	11	5	0
Printing oaths	-	1	1	0
Rent of ground	-	30	0	0
		895	18	0
				Fifteen

1811.	Fifteen poll clerks, and coach hire, and expences from town, &c. - - - - 173 5	
WATKIN J. SANDYS and another	Agents' fees, procuring same - - - - 15 15	189 0 0
		£1493 14 0

It was sworn, that *Lord Berkley* and his agents first requested the sheriff to erect hustings, to retain an assessor, and to procure poll clerks from London; that the sheriff gave directions for doing so; that some days before the election began, *Sir E. B. Sandys* concurred in every thing that had been done; and that both candidates promised to contribute to the expence of these preparations. Hustings were accordingly erected; a gentleman at the bar was brought down as assessor; and fifteen poll clerks arrived from London. But on the morning fixed for the election, *Sir E. B. Sandys* declined, and *Lord Berkley* was returned without opposition. It was proved, that the plaintiff had actually made all the payments mentioned in the bill.

Taunton, for *Sir E. B. Sandys*, contended, first, that a joint action could not be maintained against both candidates. By stat. 18 Geo. 2. c. 18, § 7. it is provided, that the sheriff shall erect, at the expence of the candidates, such number of convenient booths for taking the poll, as the candidates or any of them shall, three days at least before the commencement of the poll, desire, and shall affix the names of the hundreds, and appoint poll clerks, &c. But it could never be the intention of the legislature to make each candidate

gate liable for all the expences which should thus be incurred at the election. Upon this construction of the statute, the whole might be levied upon a candidate who had no wish that hustings should be erected at all, and his remedy against the others for a contribution might be difficult and uncertain. The candidates must be taken to be separately liable for their respective proportions.—At any rate this action was misconceived. There was no liability at common law to reimburse the sheriff for any part of the expence he incurred. He ought therefore to have declared specially, that he provided booths, poll clerks, &c. upon the requisition of the candidates; whereby, and by means of the statute in that case made and provided, they became liable to reimburse him for the expence he had thus incurred, and that being so liable they promised to reimburse him accordingly. If the action could be maintained in its present form, it would be for his lordship to say to what amount the plaintiff was entitled to recover.

1811.

↙

WATSON
v.
SANDYS
and another.

LAWRENCE J.—Both objections admit of the same answer. The plaintiff does not proceed upon the statute. If the sheriff had merely been desired to erect booths in pursuance of the statute, then we should have had to consider what remedy the statute gives him.—But there is an express undertaking on the part of both to pay for the hustings, the assessor, and the poll clerks, on which the two are jointly liable. However, although the action is certainly maintainable, there are several parts of the plaintiff's demand with which he has no right to charge the defendants. The first

1811.

WATHEN
v.
SANDYS
and another.

eight items amounting to 40*l.* 5*s.* for the indentures, &c. only concern the execution of his office of sheriff, and there is no pretence for charging them upon the candidates. The same thing may be said of the charge for constables. 'The sheriff is bound to preserve the peace of the county.' If he is put to any extraordinary expence in this way, let him represent the matter when he passes his accounts in the Exchequer, or directly to His Majesty's government.—Any claims he may have for remuneration will thus be attended to; but he has no more right to recover such charges from a candidate at the election, than from any other individual in his bailiwick (*a*). There were several other items that his Lordship advised the jury to disallow entirely, such as the *surveyors*, and *printing the poll books*.—Another class he advised them considerably to reduce. The plaintiff could only recover the original expence of erecting the hustings, not the costs of any action brought against him by the person who had erected them.—For the assessor his Lordship thought the defendants liable, although this be an expence not mentioned in the statute, which was meant for the protection of the sheriff, not of the candidates; but the accompanying charges for agents' fees, &c. in retaining the assessor, he considered as exorbitant. Advantage, he observed, was often taken of the situation of candidates to sit in parliament, who were afraid

(*a*) By 10 & 11 W., 3. c. 7. in the Crown-office and to have the sheriff is entitled to charge an allowance thereof in his account to his Majesty the fees he pays count in the Exchequer.

to resist any demand, however unreasonable, lest they should render themselves unpopular; and thus a sort of custom was set up for the impositions practised upon them; but such charges as 25 guineas for leaving a retainer with a gentleman at the bar, and paying him his fees, could not be supported in a court of justice, however long established.

The jury found a verdict for the plaintiff for 1360*l.*

Dauncey and Abbott for the plaintiff.

An application was made in the ensuing term by Sir E. B. Sandys for a new trial, on the ground that, from the absence of a material witness, he had been shut out from his defence; and that in point of fact he had not ordered the hustings, or promised to pay for them; but the direction of the judge at Nisi Prius was in no respect questioned.

1811.
WATHEN
v.
SANDYS
and another.

Vide Morris v. Burdett, 1 Campb. 218. Heyw. 269.

HEREFORD.

Coram LAWRENCE, J.

Tuesday,
March 10.

If the defendant is charged by a count in an indictment with having "composed, printed and published a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing.

The KING v. WILLIAMS, Esq.

THIS was an indictment for a libel, which was charged in several counts to have been composed, *printed*, and published by the defendant.

The counsel for the prosecution gave in evidence a M. S. copy of the libel, in the defendant's hand-writing, which he had himself delivered to a printer, and a printed copy, which had been printed and sold by his orders. From some typographical blunders, there was a variance between the printed copy and the libel set forth in the indictment; but the M. S. corresponded with it exactly.

The counsel for the defendant insisted, that the offence was not proved as laid, and that he was entitled to an acquittal.

LAWRENCE J. - There is certainly no proof that the defendant *printed* the libel in question; but he may be acquitted of the *printing*, and found guilty of the *composing* and *publishing*. His delivering the libel in his own hand-writing to the printer, is abundant evidence of the latter offence.

A verdict

A verdict was accordingly found and recorded of
"Guilty, except as to printing the libel."

1811.

Taunton and *J. Jones* for the prosecution.

The KING
v.
WILLIAMS.

Dauncey, Abbott, and Peake for the defendant.

Vide Rex v. Hunt, ante 583.

THOMAS d. JONES and WIFE v. REECE THOMAS.

Tuesday,
March 19.

EJECTMENT by landlord against tenant from
year to year. The demise was laid on the 1st
of October last.

Abbott, for the lessor of the plaintiff, gave in evi-
dence, receipts for rent payable at Michaelmas, and
proved, that a notice to quit at Michaelmas last had
been served upon the defendant personally at the
preceding Lady-day, when the defendant made no
objection to its regularity.

If a notice to quit is served personally on the tenant in pos-
session, and he makes no ob-
jection to it, this is prima
facie evidence to be left to the
jury, that the tenancy com-
menced in the
season of the
year when the
notice to quit
expires.

Taunton, for the defendant, insisted, that it was
necessary to give further evidence of the tenancy
having commenced at Michaelmas.

LAWRENCE J. I remember C. J. Eyre ruling on
the

1811.
 THOMAS d.
 JONES and
 WIFE
 v.
 THOMAS.

the Western circuit (*a*), that a notice to quit if not objected to by the tenant in possession when served upon him, is *prima facie* evidence, that the tenancy commenced at the season of the year when the notice expires. I have acted upon that case, and I am not aware that it has ever been overturned. Here, I will admit evidence to shew the commencement of the tenancy to have been from Christmas, Midsummer, or Lady-day; but till the contrary is shewn, I will presume, from the defendant's making no objection to the notice, that it commenced at Michaelmas.

The lessor of the plaintiff had a verdict; — to set aside which *Taunton* moved in the ensuing term, on the authority of *Doe d. Ash v. Calvert, ante* 388, where Lord ELLENBOROUGH is represented to have held, that a notice to quit is not *prima facie* evidence of the period of the year when the tenancy commenced: and to have said, that “to make the party’s own act evidence in his favour, is contrary to first principles.”

COURT.—There the notice to quit was not served personally upon the defendant; and the notice *per se* is certainly no evidence for the lessor of the plaintiff. But here, the notice was served personally upon the defendant, and he made no objection to it. If there was any doubt, whether he thereby admitted its regularity, this was a question of fact, which the de-

(*a*) Doe dem. Puddicombe *v. Harris*. 1 T. R. 161.

Defendant's counsel might have had submitted to the Jury. Whether the personal service and silence of the tenant in possession amount to an admission, must depend upon circumstances. If he cannot read, or does not read the notice in the presence of the person who serves it upon him, it must go for nothing. In the present case, we must suppose that the defendant read the notice and understood its contents, and that the person who served it stayed so long that the defendant might have objected to it in his presence, but made no objection. These circumstances, we think, amount to *prima facie* evidence of the commencement of the tenancy and being uncontradicted, they support the verdict.

Rule to shew cause refused.

—

But in *Oakapple d. Green v. Copous*, 4 T. R. 361, where a tenant in possession, when served with a notice to quit at *Midsummer*, said, "I pay rent enough already, and it is hard to use me thus," he was permitted to shew that he held from *Michaelmas*;

and *BUTLER, J.* observed, that whether the tenant assents to be considered as holding from the time mentioned in the notice, is a question of fact for the jury. *Vide Doe v. Wombewell, ante* 559.

1811.
THOMAS d.
JONES AND
WIFE
v.
THOMAS.

SALOP.

CROWN SIDE. Cor. LAWRENCE. J

Wednesday,
March 27.

An indictment
against a master
for not providing
sufficient
food and sus-
tance for a ser-
vant, whereby
the servant be-
came sick and
emaciated, must
allege that the
servant was of
tender years, and
under the domi-
nation and control
of the master.

REX v. ELIZABETH RIDLEY.

THE indictment stated, that Elizabeth, the wife of Samuel Ridley, unlawfully and maliciously contriving and intending to hurt and injure one Elizabeth Williams, being a servant to her the said Elizabeth Ridley, heretofore to wit, on &c. and on divers other days and times, as well before as after that day, with force and arms, at &c. unlawfully, wilfully and maliciously did omit, neglect and refuse to provide for and give and administer to the said Elizabeth Williams, sufficient meat and drink, necessary for the sustenance, support and nourishment of the body of her the said Elizabeth Williams, and expose the said Elizabeth Williams to the cold and inclemency of the weather, as well within as without the house wherein she the said Elizabeth Ridley then dwelt, and keep the said Elizabeth Williams without sufficient and proper warmth necessary for the health of her the said Elizabeth Williams, to wit, at &c. the said Elizabeth Williams on the several days and times, and during all the time aforesaid, being the

the servant of the said Elizabeth Ridley, and the said Elizabeth Ridley on the several days and times, and during all the time aforesaid, living separately and apart from the said Samuel Ridley her husband, to wit at &c. contrary to the duty of her the said Elizabeth Ridley as the mistress of the said Elizabeth Williams: By reason of all which premises she the said Elizabeth Williams afterwards, to wit on, &c. became and was, and for a long time, to wit, the space of six months then next following, continued to be very weak, sick and ill, and greatly consumed and emaciated in her body, to wit, at &c. to the great damage of the said Elizabeth Williams, in contempt, &c. to the evil example, &c. and against the peace, &c.

1811.
RLX
v.
RIDLX.

The case being opened—

LAWRENCE J. intimated, that he thought the indictment insufficient, in not alledging that *Elizabeth Williams was a girl of tender years, and under the dominion and control of the defendant.*

The counsel for the prosecution contended, that it was enough to state, that she was the servant of the defendant. From the relation of master and servant, a duty arises on the part of the master, to provide necessary sustenance for the servant; and a breach of this duty, whereby the servant becomes sick, diseased and emaciated, must be a misdemeanor. Indictments for murder have frequently been sustained

1811.

 Rex
 RIDLEY.

for starving persons to whom it was the duty of the prisoners to have administered proper nourishment. If an indictment for *murder* will lie where death is the direct consequence of the starving, an indictment which states the consequence to be, that the party became sick, diseased and emaciated, sets forth what is in law a *misdemeanor*—At any rate, the objection was on the record.

LAWRENCE J.—There was a case similar to this before Mr. Justice LE BLANC, at Exeter in 1802.—The indictment charged, that the defendant did not provide proper and necessary food and clothing for a person who was his servant, whereby the latter became sick, &c. The defendant was found guilty; but Mr. Justice LE BLANC, reserved the point for the opinion of the judges. Ten of the judges met to consider the case, and a majority of those present were of opinion, that the indictment was insufficient, in not alleging that the servant was of tender years and under the controul and dominion of the defendant. The trial may proceed, as issue is joined upon the guilt or innocence of the defendant of the offence laid to her charge; but on a motion in arrest of judgment I shall consider myself bound by the decision I have mentioned. There is a clear distinction between treatment of this sort to a child and to an adult. The latter, if not provided with proper nourishment, may remonstrate, may leave the service, or may complain to a magistrate. The withholding of proper food from such a person may

be

be a breach of contract; but it is not a crime of which the law will take cognizance. Doubts have been entertained, how far an indictment can be supported from mere *non feazance*, towards a child of tender years. I am myself of opinion, that there are circumstances where non-feazance of this description may be an indictable offence. If Elizabeth Williams was of tender years, and under the dominion of the defendant, so that she could not have taken steps to relieve herself from the treatment she is supposed to have received, the defendant may be guilty of a misdemeanor. But you have not alleged this in the indictment, and it is therefore bad upon the face of it.

It was then suggested, that in this case, the indictment charged, that the defendant exposed Elizabeth Williams to the inclemency of the weather.

LAWRENCE, J.—That, to be sure, is an act in the nature of an assault, for which the defendant may be liable, of whatever age the servant was; but the evidence opened, does not at all apply to such a charge.

The counsel for the prosecution allowed, they could not prove this charge in the indictment to any extent; and his Lordship being of opinion, that the omission to state that the girl was of tender years and under the dominion of the defendant, was fatal as to the withholding food and warmth, they declined to proceed farther, and consented to an acquittal.—It was said, the girl was 15 years old.

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REX
v.
RIDLEY,

1811.

Clifford and Abbott for the prosecution.Rex
v.
RIDDLEY.*Dauncey, Hart and Glead* for the defendant.

c. c.

Vide Regina v. Gould, Salk 281. Rex v. Stephen Self, 1 Leach, Cro. Cas. 163.—East, C. P. c. v. § 13. and the authorities there referred to.

WORCESTER.

CROWN SIDE. Cor. LAWRENCE, J.

Friday,
April 5.

REX v. THOMAS ROGERS.

To support an indictment
42 G. 3. c. 107,
for coursing a deer in an inclosed ground,
it is necessary,
on the part of
the prosecution, to call the owner of the deer to prove, that he did not give his consent to the
prisoner to course them.

THIS was an indictment on 42 Geo. 3. c. 107, § 1.
(a) for coursing a deer in an inclosed ground,
belonging to R. B. C. Esq. without the consent of the
said

" "

(a) Which enacts, "that if any person or persons shall wilfully course or hunt, or take in any slip, noose, toil or snare, or kill, wound or destroy, or shoot at or otherwise attempt to kill, wound or destroy, or shall carry away any red or fallow

said R. B. C. the owner of such deer, and without being otherwise duly authorised,

The question was, whether the onus lay upon the prisoner, to prove that he had the consent of R. B. C., the owner of the deer, to course them in the place in question? .

LAWRENCE J. held, that it was necessary on the part of the prosecution, to call the owner of the deer, for the purpose of proving, that he had *not* given his consent to the prisoner to course them; and this witness not appearing, the Jury were directed to find a verdict of

Not Guilty.

Hence for the prosecution

Campbell for the prisoner.

low deer kept or being in the inclosed part of any forest, chase parieur, or ancient walk, or any inclosed park, paddock, wood or other inclosed ground wherem deer are, or have been, or shall be usually kept, *without the consent of the owner of such deer or without being otherwise duly authorized;* or shall knowingly be aiding, abetting or assisting therem or therein, every person so wilfully offending as aforesaid in any of the cases above mentioned, shall be deemed and taken to be guilty of *felony*, and being lawfully convicted thereof, upon indictment, shall be adjudged to be transported for the term of seven years."

1811.
REX
v.
ROGERS,

1811.

[It may be useful to refer to the following short note of *Fenton v. Goudry*, (iii.) a more full and satisfactory report of the case shall be published by Mr. EAST.]

**FENTON
v.**

GOUNDRY.
It is no cause of
demurrer to a
declaration
against the ac-
ceptor of a bill
of exchange ac-
cepted payable
at a particular
place, that it
does not allege
that the bill is
presented there
for payment.

**FENTON v. GOUNDRY and
others, K. B. E. T. 1811.**

The plaintiff declared that he drew a bill of exchange, dated 4th February, 1810, for 237l. 12s. 6d. payable to his own order at 4 months after date, directed to the defendants (by the name, style and description of William Goudry and Co., 51, Lower Shadwell, Wapping, London); that the defendants accepted the bill according to the usage and custom of merchants, *payable at C. Sykes, Snaith and Co.* that the plaintiff made no order for payment of the bill; whereby the defendants became liable to pay him the bill at the time the same should become due according to the tenor and effect of the said bill, and of their said acceptance thereof as aforesaid; which they promised to do.—The money counts followed, with the common breach.—Special demurrer to the first count, for that it did not thereby appear that the bill was ever presented for payment at *C. Sykes, Snaith and Co.'s* according to the acceptance.

Marryat having been heard in support of the demurrer, and *Holroyd* contra,—

Lord ELLENBOROUGH, C. J.— and **GROSE** and **BAYLEY**, Justices, (absentee **LE BLANC**, J.) declared themselves clearly of opinion, that it was unnecessary to allege a presentment for payment at *Sykes, Snaith and Co.'s*. They considered the place where the bill is made payable as no part of the contract any more than the place of the acceptor's residence, which is generally mentioned in the direction of the bill; that if this were a special acceptance, the drawer and previous indorsees would be discharged; and that by all the authorities upon the subject, (with the exception of the late case of *Callaghan v. Aylett*,) the acceptor of a bill of exchange is held to be universally liable upon it, wherever it may be expressed to be payable.—
They thought that, even if the place where the bill is made payable by the acceptor were not a mere memorandum but a part of the contract, still the defendant could not demur on account of there being no presentment there alleged in the declaration; because he would not be discharged, although the bill was not presented

sented there for payment ; and if he was there ready to pay it on the day it became due, he could only plead this in bar of damages, bringing the money into Court, as in the case of rent payable on the land, or money to be paid at a given time and place in pursuance of an award.

However, as the point was of so much consequence, the Judges said, they would take further time to inquire into the

decision in the Common Pleas.—They did not again mention the case of *Fenton v. Goundry* in the course of Easter Term ; but Lord ELLENBOROUGH C. J. and Bayley J. have both held at *Nisi Prius* since, that, in an action against the acceptor, there is no occasion to prove that the bill was presented for payment at the place where it is made payable by the acceptance.

June 1, 1811.

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FENTON
v.
GOUNDRY.

AN

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CHANGE AND PROMISSORY NOTES.
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AND RECEIVED. PHYSICIAN.

1. It is actionable to discharge a gun so near an ancient decoy as to frighten the wild fowl from it, even without firing at the wild fowl in the decoy. *Carrington v. Taylor,* 258
2. Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped by *order and on account* of the consignee. The consignor cannot maintain any action against the ship-owner in respect of the goods, as the property must be taken to have vested in the consignee

from the time they were put on board the ship. *Brown v. Hodgson,*

36.

3. A Frenchman domiciled at *Lisbon* consigns a cargo, which is his property to *Nantes*, under the name of a native Portuguese, who acts as '*neutralizer*'. The ship being taken and brought into an English port, the cargo is libelled in the court of Admiralty: The Portuguese, with the privity of the Frenchman, claims it and it is decreed to be delivered up to him as neutral property.—*Held* that an action at law could not afterwards be maintained by the Frenchman against the Portuguese to recover the proceeds of the cargo. *De Metton v. De Mellon,* 420

- . It is agreed between *A.* and *B.* that *A.* for certain commission shall ship a cargo of wheat, of a specific quality, at a foreign port for *B.* in England. The wheat shipped by *A.* being found upon its arrival to be of an inferior quality, *B* brings an action against *A.* for a breach of the agreement, and recovers damages.—*Held*, that *A* cannot afterwards maintain an action

action against *B.* for the commission, as his claim for this might have been given in evidence in the former action, to reduce the damages. *Kist v. Atkinson,* 63.

5. *A.* pays a sum of money into a banker's for a specific purpose, the banker's clerk, by mistake, pays this money to *B.* who has no right to it.— Held, that *A.* cannot maintain an action against *B.* to recover it back. *Rogers v. Kelly,* 123

6. A man's creditors enter into an agreement with him not under seal, to take 20*l.* per cent. upon their respective debts, in satisfaction of the whole; — 10*l.* per cent. to be paid within a month, and the remaining 10*l.* per cent. to be secured by the acceptances of a third person at 5 and 9 months. The composition is paid pursuant to the agreement.—A creditor who has signed the agreement and received the composition, cannot afterwards bring an action for the residue of his debt. *Steinman v. Magnus,* 124

7. Where a man's creditors agree to take a composition on their respective debts, to be secured partly by the acceptances of a third person, and partly by his own notes, and to execute a composition deed containing a clause of release, he cannot be sued for the original debt due to a creditor who had promised to come in under the agreement, to whom the acceptances and notes were regularly tendered, and who refused to execute the composition deed after it had been executed by all the other creditors. *Brading v. Gregory,* 383

8. An action cannot be maintained by a brick-maker for the price of bricks, which are under the standard dimensions required by stat. 17 G. 3. c. 42. although, when sold, they were selected by the purchaser himself, and they were afterwards used by him in building a house, without any complaint being made as to their size or quality. *Law v. Hudgson,* 147

9. An action for the expences of suing out and prosecuting a commission of bankrupt till the choice of assignees cannot be maintained against petitioning creditor and another person. *Finchett v. How,* 275

10. If the candidates at a county election jointly desire the sheriff to erect hustings, to provide poll-clerks, and to retain an assessor, promising to defray the expence thus incurred, they are liable jointly to an action on *indebitatus assumpsit* at his suit upon their joint undertaking, notwithstanding stat. 18 G. 2. c. 18. § 7. But the sheriff is not entitled to charge the candidates with any part of the expence necessarily incurred by him in executing the writ, and making the return: and for those things expressly ordered by the candidates, they are only bound to pay him a fair remuneration, although he himself may have paid more in submitting to exorbitant charges usually made on such occasions. *Wathen v. Sandys,* 640

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 4. LEASE.

ALIEN ENEMY.

If to a plea, that *A.* for whose benefit the action is brought, is an *alien enemy*, the replication state that *A.* is resident in this country by the licence of our Lord the King; to support an issue taken upon this fact, it is not enough for the plaintiff to prove that a licence was granted by our King to *A.* while an alien *amie* to undertake a voyage to a foreign country and

from thence to England, which did not terminate till after the commencement of hostilities between his country and ours, and that after the termination of the voyage he went about at large here, without being molested by the English government. *Boulton v. Dobree,* 163

APPRENTICESHIP.

1. A man is not liable to penalties under 5 Eliz. c. 4. as for exercising a trade without having served an apprenticeship to it, who merely exercises the trade incidentally as a branch of his general business. Therefore, a master coachmaker may lawfully keep journeymen blacksmiths in his employ to make the iron work of coaches, although he has not served an apprenticeship to the trade of a blacksmith. *Coward v. Maberley,* 127

—So of a master carpenter, and journeymen sawyers, *Ib.*

2. An action will not lie on 5 Eliz. c. 4. for setting to work a person who had not served an apprenticeship in the business of a *coach-maker*, that business not being known in England when the statute passed. *Pride g. t. v. Stubbs,* 397

3. A master workman employs in a trade within 5 Eliz. c. 4. a person who had never before worked in it, under a parol agreement to teach him the business, in consideration of a premium, and to pay him weekly wages. This is not an apprenticeship within the meaning of the statute; and the master is thereby subject to a penalty for *setting to work* in his trade one who has not served therein seven years as an apprentice. *Beale g. t. v. Gcale,* 1

4. In an action on 5 Eliz. for setting to work a journeyman who has not served an apprenticeship, the plain-

tiff cannot recover any penalty that had been incurred a year before the commencement of the suit, although the defendant continued to employ the same journeyman within the year. *Evans g. t. v. Hunter,* 293

ARREST.

* See MALICIOUS ARREST.

ASSUMPSIT, ACTION OF.

An action of *assumpsit* cannot be maintained on a running account between a merchant and a broker—the proper remedy at law being, an action of *account*. *Scott v. M'Intosh,* 238 In *assumpsit*, a release may be given in evidence under the general issue. *Hawley v. Peacock,* 557

ASSUMPSIT IMPLIED.

* See ACTION, 5.

1. A levy is made on the goods of a trader after he has committed an act of bankruptcy, and the money levied is paid over to the party: an action of trover is afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages are recovered; and these, together with the costs, are paid by the bailiff.—Held that there is no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover; but that the bailiff might maintain *money had and received*, to recover back the levy money paid over. *Wilson v. Milner,* 452
2. There is no implied promise on the part of an officer in the East India Company's service to pay the captain of a company's ship by which he returns to England, more than the regulation sum for his passage, although

although it may have been usual to pay more. *Adderley v. Cookson*, 15

ATTESTING WITNESS.

1. In an action on a post-obit bond, it appeared that the attesting witness was an attorney, who formerly had an office in London; and resided at Sydenham.—Held that it was not enough to let in evidence of his hand-writing to prove the execution of the deed, that he had disappeared from his office in London for a twelvemonth before the trial, and had not been heard of during that period by persons who knew him, without shewing that search had been made after him at the house he occupied at Sydenham. *Wardell v. Fermor*, 282

But evidence of his hand-writing was admitted, on proof that a twelve-month ago, a commission of bankrupt had been sued out against him, to which he had never appeared, *Ibid.*

2. If the attesting witness to a deed swears that he did not see it executed, it may be proved by evidence of the hand-writing of the party. *Fitzgerald v. Elsee*, 635

3. So if the subscribing witness to a promissory note swears that he did not see it drawn, it may be proved by evidence of the hand-writing of the maker, *Lemon v. Dean*, 636

4. If the plaintiff declares upon a deed and there is no plea of *non est factum*, still, if at the trial he would read any part of the deed which is not upon the record, he must prove it by the attesting witness in the usual way. *Williams v. Sills*, 549

ATTORNEY.

See Action. 9.

1. Where two persons are liable to an attorney for business done on their joint retainer, it is sufficient for him

to deliver a copy of his bill in pursuance of 2 G. 2. c. 23. to one of them, from whom he received his instructions, and to whom the management of the business was left by the other. *Finchett v. How*, 277 *Aliter* of a delivery to that one who did not intermeddle; for he cannot be considered as having authority to receive it for both, nor is he likely to know what foundation there is for the charges in the bill. *Ib.*

2. In an action on an attorney's bill, it is sufficient to give in evidence a judge's order to tax the bill, the defendant's undertaking to pay what should appear to be due, and the master's allocatur thereupon. *Lee v. Jones*, 496

3. In an action on an attorney's bill, the plaintiff cannot give parol evidence of the contents of the bill delivered, without a notice to produce it: but a copy made at the same time with the bill delivered, is good evidence, without such notice. *Philipson v. Chasé*, 110

4. A. having a demand upon B., B. before A. commences any action, employs C. his attorney, to make certain propositions to A. upon the matters in difference between them. C. cannot be examined as to what B. said upon the occasion, for this is to be considered a privileged communication between attorney and client. But what C. said when he made the propositions to A. is good evidence against B. without further proof of C. being authorized by him than the fact of C. being his attorney. *Gainsford v. Grammar*, 9

5. An attorney is not at liberty to disclose in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cause before the Court. *Rex v. Withers*, 578

BAIL

BAIL OND. .

- Although it be irregular to bring an action on a bail bond in a different court from that in which the original action was commenced, yet the defendant cannot take advantage of this under the plea of *non est jactum*. *Wright v. Walmsley*, 396
- In an action on a bail bond against one of the sureties, the declaration averred, that by a writ of latitat the sheriff was commanded to take "one Francis J. by the name of John J."— Held, that this averment was not supported by evidence of a latitat in the common form, commanding the sheriff to take John J.; although the bail bond was signed by the principal, "Francis J. arrested by the name of John J. and the plaintiff offered to prove that this person was their debtor, whom they meant to hold to bail. *Scandover v. Warne*, 270
• • •

BANKERS.

See ACTION, 5. BANKRUPT, 10. BILLS OF EXCHANGE, 11. PROMISSORY NOTES and CHEQUE. INDIMENT, 5.

- If bankers pay a cancelled cheque drawn by a customer, under circumstances which ought to have excited their suspicion, and induced them to make enquiries before paying it, they cannot take credit for the amount. *Scholey v. Ramsbottomi*, 485
- Bankers cannot charge *interest upon interest*, without an express contract for that purpose. *Dawes v. Pinner*, 486
- In an action by bankers to recover the amount of a bill of exchange accepted by the defendants payable at their house, and paid by them after it was indorsed, they are bound to prove the indorsement by the payee as well as the acceptance by the defendant. *Foster v. Clements*, 17

- A banker in London who receives a cheque by the general post, is not bound to present it for payment till the following day. *Rickford v. Ridge*, 357
- Bankers having accepted bills for the accommodation of a trader, he after committing an act of bankruptcy, but before a commission is sued out, lodges money with them to take up the bills, which do not become due till after a commission is sued out, and are then regularly paid by the acceptors.—Held that they were bound to refund this money to the assignees, and that they neither had a right of set off under 5 G. 2. c. 30; nor could protect themselves under 19 G. 2. c. 32, as having received the money in payment of bills of exchange in the ordinary course of trade. *Tampling v. Diggins*, 312.

BANKRUPT.

See BILLS OF EXCHANGE.

- A man is not a trader within the meaning of the bankrupt laws by building a public theatre to be held in shares, for which he was to be paid according to measure and value, he himself being proprietor of several shares;—nor by erecting public baths on ground of which he was joint tenant in fee. *Williams v. Stevens*, 300
- A trader commits an act of bankruptcy, by assigning all his stock in trade to A. who is a party to the deed of assignment. Although A. cannot himself sue out a commission of bankrupt against him, upon this act of bankruptcy, he may act as an assignee under a commission sued out upon it by a third person. *Jackson v. Irvin*, 49
- In actions by assignees of bankrupts, to which the general issue was pleaded before the passing of Sir Samuel Romilly's

Romilly's act, 49 Geo. III. c. 131
the proceedings under the commission
are sufficient evidence to prove the
trading act of bankruptcy, and pe-
titioning creditor's debt. *Willock*
v. Smith, 184

4. Although in an action by the assignees of a bankrupt, the defendant has once pleaded, without giving notice under 49 G. 3. c. 121. s. 10. which the statute requires to be given, "at or before the time of his pleading," yet if he has leave to withdraw his plea and plead *de novo*, such a notice given with the second plea is sufficient, 325

5. In an action by the assignees of a bankrupt, if no notice is given under 49 Geo. 3. c. 131. that the validity of the commission is disputed, the petitioning creditor's debt is sufficiently proved by the deposition of the petitioning creditor himself before the commissioners. *Bisse v. Randall,* 493

6. In an action by the assignees of a bankrupt, upon proof that the petitioning creditor's debt once existed, the law will presume that it continued down to the time of the bankruptcy. *Jackson v. Irvin,* 50

7. Goods in the hands of a retail dealer *upon sale or return*, pass under a commission of bankrupt against him, by 21 Jac. 1. c. 19. *Licesay v. Hood,* 83

8. If the goods of a trader are taken in execution after an act of bankruptcy, and the money arising from the sale paid over by the sheriff two months before a commission is sued out, the bankruptcy will over reach the execution, notwithstanding 46 G. 3. c. 135. which protects all bona fide payments and transactions by or with the bankrupt more than two calendar months before the date of the commission. *Blogg v. Phillips,* 129

9. A warrant under a *fi. fa.* against

the goods of a trader is directed to his servant and another person as special bailiffs: They in consequence take possession of the goods in his shop; but the business of the shop, though without the trader's interference, is carried on apparently as usual: While things are so situated, the trader commits an act of bankruptcy. Held, that the goods pass under the commission to the assignees; as the possession of the servant was the possession of the master, and the goods were thus in "the possession, order, and disposition of the bankrupt at the time of the bankruptcy." — *Jackson v. Irvin,* 48

10. Bankers having fraudulently sold out stock belonging to a customer, which stood in their names, and applied the proceeds to their own use; while they remained solvent wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name, and inclosing a memorandum, stating that they had deposited the bonds with him as a collateral security for his stock, which they promised to replace: This parcel they in fact deposited among the securities belonging to other persons who dealt with them, but gave no information of any of these circumstances to the customer till the eve of their bankruptcy, when they sent him the parcel with the bonds, saying "they must stop payment next morning." Held that the customer could not retain the bonds against the assignees of the bankers. *Wilson v. Balfour,* 579

11. If *A*, a shopkeeper, procure *B.* to discount accommodation bills drawn by him and accepted by third persons, and *B.* afterwards require *A.* to give him a collateral security for the payment of the bills; upon which *A.* secretly deposits with him a quantity of goods from his shop, to

to be sold for *B.*'s benefit if the Bills should not be paid; and soon after, *A.* becomes bankrupt, and the bills are dishonoured; the depositing of the goods in this manner as a security, cannot be invalidated as a voluntary preference in contemplation of bankruptcy. *Crosby v. Crouch*, 166,

BARON AND FEME.

See COVERTURE, CRIM. CON.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKERS, BANKRUPT, 11. EVIDENCE, 9. VARIANCE 2, 3, 4, 5, 6,

1. An action at law cannot be maintained against the acceptor of a bill of exchange which was lost, after being indorsed, although a bond of indemnity has been tendered to the defendant. *Pierson v. Hutchinson*, 211
2. If a bill when lost had only a special indorsement upon it, the indorsee may recover at law, without producing the Bill. *Long v. Bailie*, 214 n
3. An instrument acknowledging the receipt of drafts for the payment of money, and promising to repay the money, is a special agreement and not a promissory note. *Williamson v. Bennett*, 417
4. Upon an instrument in the common form of a joint and several promissory note, signed by three persons, there is an indorsement written at the time of signing it, stating that the note is taken as a security for all balances to the amount of the sum within specified, which one of the three might happen to owe to the payee: that the note should be in force six months; and that no money should be liable to be called for sooner in any case. In an action against one of the sureties, the payee cannot declare upon this instrument as a promissory note, payable either on demand, or
- at six months after date. Between these parties, the instrument is an agreement, and must be stamped and declared upon as such. *Leeds v. Lancashire*, 205
5. If a bill of exchange be accepted by the drawee, another person who, for the purpose of guaranteeing his credit, likewise accepts the bill in the usual form, is not liable as acceptor, but must be sued upon his collateral undertaking. *Jackson v. Hudson*, 447
6. If a promissory note appears on the face of it to be the separate note of *A.* only, it cannot be declared on as the joint note of *A.* and *B.* though given to secure a debt for which *A.* and *B.* were jointly liable. *Sifkin v. Walker*, 308
7. The presentation of a bill of exchange for payment at the house of a merchant residing in London, at 8 o'clock in the evening of the day it becomes due, is sufficient to charge the drawer. *Barclay v. Bailey*, 527
8. In an action against the maker of a promissory note expressed to be payable at a particular place, there is no necessity for proving that it was presented there for payment. *Nichols v. Bowes*, 498
9. Held by court of C. P. that if a bill of exchange be accepted payable at a particular place, in an action against the acceptor, the plaintiff must prove that it was presented there for payment when it became due. *Callaghan v. Aylett*, 549
10. But subsequently determined in K. B. that it is no cause of demurrer to a declaration against the acceptor of a bill of exchange accepted payable at a particular place, that it does not allege that the bill was presented there for payment. *Fenton v. Gourdy*, 656.
11. If a bill of exchange is accepted, payable at Messrs. *A. B. & Co's.* who are bankers in the city of London, a presentment

sentment of the bill for payment to their clerks, at the *Clearing House* is sufficient. *Reynolds v. Chettle*, 596

12. Notice of the dishonour of a bill of exchange must be given to the drawer and indorsers by the holder himself, or some person authorized by him. *Stewart v. Kennet*, 177

13. If the drawer or indorser of a bill of exchange receives due notice of its dishonour from any person who is a party to it, he is directly liable upon it to a subsequent indorser from whom he had no notice of the dishonour. *Jameson v. Swinton*, 373

14. In an action by the *fourth*, against the *first* indorsee of a bill of exchange, all the parties to which resided in London, it appeared that the plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the two-penny post office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d: *Held*, that by this laches the plaintiff had discharged all the prior indorsers, although in the course of the 22d, notice of the dishonour was given both to the *second* indorsee and to the defendant. *Smith v. Mallett*. 208

15. It is not enough that the drawer or indorser receives notice in as many days as there are subsequent indorsees, unless it is shewn that each indorsee gave notice within a day after receiving it; as if any one has been beyond the day, the drawer and prior indorsers are discharged. *Marsh v. Maxwell*. 210 n

16. The holder of a bill of exchange is excused for not giving regular notice of its being dishonoured to an indorser of whose place of residence he is ignorant, if he use reasonable diligence to discover where the indorser may be found. *Bateman v. Joseph*, 461

17. The holder of a bill of exchange is excused for not giving notice of its dishonour in the usual time, by the day on which he should regularly have given the notice being a public festival, during which he is strictly forbidden by his religion to attend to any secular affairs. *Lindov v. Unsworth*, 602

18. If the drawer of a bill of exchange when it is presented for acceptance, has effects in the hands of the drawees, though he is indebted to them to a much larger amount, and they, without his privity, have appropriated the effects in their hands to the satisfaction of the debt, he is entitled to notice of the dishonour of the bill for non-acceptance, as he might expect under these circumstances that it would be accepted and paid. *Blackham v. Doren*, 503

19. In an action on a bill of exchange, the plaintiff cannot be compelled to prove what consideration he gave for it, by a mere notice that he will be required so to do. 596

20. In an action by the indorsee of a bill of exchange, if it appear that a prior party was defrauded out of it, the plaintiff is bound to prove what consideration he gave for it. *Rees v. Marquis of Headfort*, 574

21. An averment in a declaration that *A. B. & Co.* accepted a bill of exchange according to the usage and custom of merchants, is supported by evidence that the bill was accepted by *C. D.* their authorized agent, thus: “*For A. B. & Co. C. D. Heyes, v. Heseltine.* (See *VARIANCE*, 3, 4, 5, 6.)” 604

22. On an action against the drawer or indorser of a bill of exchange dishonoured for non-payment after being accepted, although it be unnecessary to state the acceptance in the declaration, if it be stated, it must be proved;—but a promise to pay after

after the bill was due, it is sufficient admission of the acceptance, as well as of the hand-writing of the defendant himself and of the other parties to the bill. *Jones v. Morgan*,

474

23. Possession is *prima facie* evidence of property in negotiable instruments. Therefore, in trover for a bank note, it is not a *prima facie* case for the plaintiff to prove, that the note belonged to him, and that the defendant afterwards converted it; and the defendant will not be called upon to shew his title to the note, without evidence from the other side that he got possession of it *mala fide* or without consideration. *King v. Malsom*, 5

24. An action being brought against the acceptor of a bill of exchange, it is agreed between the parties, that the defendant shall pay the costs, renew the bill, and give a warrant of attorney to sue the debt: The defendant gives the warrant of attorney, and renews the bill; but does not pay the costs.—The plaintiff may bring a fresh action on the first bill, while the second is outstanding in the hands of an indorsee. *Norris v. Aylett*, 329

25. The holder of a bill of exchange, on its becoming due, allows the acceptor to renew it, without consulting the indorser; but the indorser afterwards says to the acceptor, *it was the best thing that could be done*. This is not a recognition of the terms granted by the holder to the acceptor, and the indorser is discharged. *Witham v. Masterman*, 179

26. If the indorsee of a bill of exchange, having notice that it is accepted without consideration, receive part payment from the drawer and give him time to pay the residue, he thereby discharges the acceptor. *Laxton v. Peat*, 185

27. If a bill of exchange is presented for

acceptance and not accepted, the drawer and indorsers are discharged by want of due notice of its being thus dishonoured; although the holder presents it for payment when due, and then gives them notice of its being dishonoured both for non-acceptance and non-payment. *Roscow v. Hardy*, 458

28. If the drawer of a foreign bill of exchange had no effects in the hands of the drawee, and had no reasonable grounds to expect that the bill would be honoured, a protest is unnecessary to charge the drawer. *Legge v. Thorpe*, 310

29. A notice of the dishonour of a bill of exchange sent by the two-penny post, is sufficient where the parties live within the limits of the two-penny post, whether near or at a distance from one another; but the letter conveying the notice should be proved to have been put into a receiving house at such an hour that, according to the course of the two-penny post, it would be delivered the day on which the party to whom it is addressed was entitled to receive notice of the dishonour of the bill. *Ittston v. Farclough*, 633

30. In an action against the indorser of a promissory note or a bill of exchange, it is a sufficient evidence of presentment for payment and notice of dishonour, that the defendant promised absolutely to pay the note or bill after it was due. *Taylor v. Jones*, 105

31. But if the drawer or indorser after being arrested, without acknowledging his liability, merely offers to give a bill, by way of compromise, for the sum demanded, this does not obviate the necessity of proving notice. *Cuming v. French*, 106 n

32. In an action against the drawer of a foreign bill of exchange, a promise of payment by the defendant after the bill was due, is sufficient evidence

of a protest for non-payment, and notice of the dishonour of the bill.—

Gibson v. Coggon, 188

33. In an action against the indorser of a bill of exchange, it is not necessary to prove any indorsements on the bill prior to the defendant's. *Critchlow v. Parry,* 182

34. The production of a bill of exchange from the custody of the acceptor is not *prima facie* evidence of his having paid it, without proof that it was once in circulation after it had been accepted.—Nor is payment to be presumed from a receipt indorsed on the bill, unless this receipt is shewn to be in the hand-writing of a person entitled to demand payment. *Pfist v. Van batenberg,* 439

35. In an action on a bill of exchange accepted for the price of goods purchased for exportation, the defendant cannot give in evidence that the goods were of a bad quality, and improperly packed, but is driven to his cross-action. *Tye v. Gwynne,* 346

BOND.

See BAIL BOND. COVERTURE, 1.

• An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed. *Moller v. Lambert,* 548

2. A bond of indemnity given to the trustees of a public unincorporated insurance company, conditioned for the good conduct of a clerk while in the service of the *said company*, remains in full force during the period the clerk continues to serve the company, although there be changes among the individual members of whom the company is composed.— *Metcalfe v. Bruin,* 422

3. The recital in the condition of an indemnity bond, professing to state the agreement between the parties,

does not confine the responsibility of the sureties to the limits therein specified. *Sansom v Bell,* 39

4. Indorsements on a bond acknowledging the receipt of interest or payment of part of the principal, are not evidence against the obligor to prove that the bond was on foot, without shewing that they were on the bond recently after their dates, and at a time when their purport was contrary to the interest of the obligee. *Rose v Bryant,* 321

BRICKS.

See ACTION, 8.

BRIDGE.

A particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood. About 40 years ago the trustees of the turnpike road built on the same site, a much wider bridge of brick, which has been constantly used ever since by all carriages passing that way. Held that to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired and still ought to repair the *said bridge*, was not supported by evidence of the above facts; and that the burthen of repairing the new bridge must be borne by the county at large. *Rex v. Inhabitants of Surrey,* 455

BROKER.

See PRINCIPAL AND AGENT. SALE.

CANDIDATE.

See ACTION, 10.

CARRIER.

See ACTION, 2.

1. A carrier places a board in his office, giving notice that he will not be answer-

answerable for jewels, however small their value, unless entered as such ; but circulates hand-bills, stating generally, that he will not be answerable for any article above the value of 5*l.*, unless entered as such.—He is answerable for the loss of jewels not entered as such, if under the value of 5*l.* *Cobden v. Bolton,* 108

2. It is not sufficient notice to limit the common law responsibility of a carrier, for him to paste upon the door of his office where goods are received and delivered, a bill blazoning the advantages of his conveyances, and stating in small characters at the bottom of it, that he will not be answerable for goods above the value of 5*l.* unless entered as such and paid for accordingly. *Butler v. Heane,* 415

3. As soon as goods are delivered to a carrier they are at the risk of the purchaser, although the carrier be paid by the vendor. *King v. Meredith,* 639

CASE.*See PLEADING, TRESPASS.***CHEQUE.***See BANKERS, 1, 4. BILLS OF EXCHANGE.*

1. If a creditor is offered cash in payment of his debt, or a cheque upon a banker from an agent of his debtor, and he prefers the latter ; this does not discharge the debtor, if the cheque is dishonoured ; although the agent fails with a balance of his principal in his hands to a larger amount. *Everet v. Collins,* 515

2. A cheque given for stock sold is lost by the vendor in going home from the Stock Exchange. The purchaser is immediately informed of this fact, but refuses to pay without an indemnity : Four months after, the bankers on whom the cheque was drawn

stop payment, with sufficient money to answer it of the drawer's in their hands.—*Held*, that under these circumstances an action would not lie for the price of the stock. *Bevan v. Hill,* 381

COACHMAKER.
*See APPRENTICESHIP, 2.***COMPOSITION.**
*See ACTION, 6, 7.***CONGEALMENT.**
*See INSURANCE, 23.***CONTINUATION.**
*See USURY.***COPYRIGHT.**

1. A musical composition published on a single sheet of paper, is privileged as a book within 8 Ann. c. 19. § 1. *Clementi v. Goulding,* 25

2. A song composed to be sung at the Italian opera, remains the property of the composer. *Storage v. Longman,* 27 n

CORPORATION.
*See NOTICE TO QUIT.***COVENANT.**
*See SHIP, TREES.***COVERTURE.**

1. In an action of debt on bond, *coverture* is a good defence under a general plea of *non est factum*. *Lambert v. Atkins,* 272

2. Under a plea of *coverture*, where it appeared that the defendant's husband went abroad 12 years ago.—*Held*, that she was bound to prove that he was alive within 7 years.—*Howell v. De Pinna,* 113

CRIM. CON.

an action for crim. con. if the plaintiff's marriage was solemnized in a chapel, he must give some evidence that banns were usually published there before the passing of the marriage act. But it is *prima facie* sufficient for this purpose, to produce an old register of marriages solemnized in the chapel before the passing of the marriage act, and a regular register of banns published there since, and to prove that within the recollection of witnesses who have attended the chapel, marriages have been solemnized and banns published in it from time to time of late years.

Taunton v. Wyborn, 297

CROSS ACTION.

See ACTION 4. BILLS OF EX-
CHANGE, 35.

CUSTOM.

There may be a valid custom in manor within the limits of an ancient or st. belonging to the crown, for the lord, with the assent of the homage, to grant parcels of the waste to be held in severalty by copy of court roll and inclosed, in exclusion of persons having rights of common. *Bouldott v. Winnall,* 261

DATE.

See TIME.

DECEITFUL REPRESEN-
TATION.

If A inquires generally of B concerning circumstance of C., A. cannot maintain an action against B. for a deceitful representation upon this subject, if C. pays A. for the goods which it was in contemplation to sell when the representation was made, although C. becomes insolvent, and is indebted to A. for other goods

subsequently sold.—*Aliter*, if A. had enquired of B. whether C. was worthy to be trusted as a general customer, or if there had been any conspiracy between B. and C. to cheat A. by paying for the first parcel of goods.

J. De Graves v. Smith, 533

DEER.

To support an indictment on 42 G. 3. c. 107, for coursing deer in an enclosed ground, it is necessary, on the part of the prosecution, to call the owner of the deer to prove, that he did not give his consent to the prisoner to course them. *Reev. Rogers,* 654

DEMURRAGE.

See SHIP.

DISTRESS.

See TRESPASS, 3.

DOUBLE VALUE AND
DOUBLE RENT.

1. Debt for double value on 4. Geo. 2. c. 28. does not lie against a weekly tenant. *Lloyd v. Rosbec,* 453
2. If a tenant from year to year give his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable to an action on 11 Geo. 2. c. 19. for double rent. *Farrants v. Elsingtan,* 591

EJECTMENT.

See NOTICE TO QUIT. TREES.

1. If a man gets into possession of a house to be let, without the privity of the landlord, and they afterwards enter into a negotiation for a lease, but differ upon the terms; the landlord may maintain ejectment to recover possession of the premises, without giving any notice to quit. *Doe d Knight v. Quigley,* 505
2. In

2. In an indenture of lease with a clause of re-entry, there is a general covenant on the part of the tenant to keep the premises in repair; and it is further stipulated by an independent covenant, that the tenant within three months from notice being served upon him by the landlord, shall repair all defects specified in the notice. The landlord after serving him with a notice, may *within the three months* bring an ejectment against him for a breach of the general covenant to repair. *Roe d Goutly v. Pain*, 520

EVIDENCE.

See ATTORNEY. BANKRUPT. BILLS OF EXCHANGE. BOND. FOREIGN ATTACHMENT. INDICTMENT. INSURANCE. LABEL.

1. The London Gazette is not evidence of the military appointments therein notified; but at the trial of an information against an officer in the army for false musters, it is sufficient to prove that he acted in the character mentioned in the information, without proving his commission from the King. *Rex v. Gardner*. 513

2. On the trial of an indictment for a fraud against an agent of government under the controul of the Treasury, a letter of instructions addressed to the defendant by the Lords of the Treasury, may be read in evidence, without proving the commission by which they were appointed. *Rex v. Jones*. 131

3. An advertisement published in several daily newspapers, is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading, one of the newspapers in which it appeared. *Boydell v. Drummond*, 157

3. In an action against the sheriff for not arresting a person on mesne process, notice of this person being

within the defendant's bailiwick given to the undersheriff's agent in London, is no evidence of such evidence to the defendant. *Gibbon v. Coggon*, 189

5. In an action by A. against B. for suing out a second writ of *fieri facias* before the sheriff had made any return to the first, the sheriff's returns to the first and second writs, stating that the execution was so conducted at A.'s request and with his consent, are *prima facie* evidence for B. against A. to support a plea of licence. *Gifford v. Woodgate*, 117

6. A deed alleged in a plea to be lost by time and accident, may be given in evidence, if having been lost at the time of pleading it is found before trial. *Hawley v. Peacock*. 557

7. A will of lands being lost, the probate is not admissible as secondary evidence of its contents. *Doe v. Calvert*, 389

8. On proof that a will of lands had been lost, parol evidence of its contents may be received from a witness who heard it read over before the testator's family on the day of his funeral. 390 n

9. Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without notice to produce it. *Ackland v. Pearce*, 601

10. The sentence of the Court of Admiralty condemning certain goods as captured from the enemy, is conclusive evidence that they were so captured. 218

11. If to an indictment for not repairing a highway against a parish consisting of three townships, viz. A. B. and C., there is a plea on the part of C., that each of the three townships has immemorially repaired its own highways separately; the records of indictments against the parish generally for not repairing highways, situate in A. and B. with general pleas of *not guilty*

guilty, and convictions thereupon, are *prima facie* evidence to disprove the custom of each township to repair separately; but evidence will be admitted that these pleas of *not guilty* were pleaded by inhabitants of A. and B. without the privity of the inhabitants of C. *Rex v. Eardisland*, 494

12. In debt on bond conditioned for the performance of covenants, if the condition is not set out in the pleadings, the plaintiff in executing a writ of inquiry under 8 and 9 W. 3. c. 11., must prove that the bond mentioned in the suggestion and produced to the jury, is that on which the action was brought. *Hodgkinson v. Marsden*, 121

13. An act of parliament for regulating the concerns of the poor in a particular parish, requires that certain notice shall be given of a vestry for the election of a treasurer, and that a treasurer shall be elected at a vestry held in pursuance of such notice.—To support an allegation in an indictment that “A was *duly* elected treasurer of the said parish,” an entry in the vestry book, stating that A was elected treasurer *at a vestry duly held in pursuance of notice*, is sufficient evidence. *Rex v. Martin*, 100

14. Where an agreement not under seal is produced at the trial by one of the parties in pursuance of an order, taking to produce it, the opposite party, to make it evidence, must prove it in the same manner as if it had come from his own custody. *Wetherstone v. Edgington*, 94

15. Where it is material for the defendant to shew that the action was commenced earlier than it appears to have been by the Nisi Prius record, the declaration delivered by the plaintiff is admissible evidence. *Harris v. Orme*, 497 n

16. If a copy of any document which itself is not evidence at common law, be made evidence by act of parliament, a copy must be produced, and the original is not made admissible evidence by implication. *Burdon v. Ricketts*, 121 n

17. In an action for words of perjury, to shew the *quo animo*, the plaintiff may give in evidence a bill of indictment subsequently preferred by the defendant against him, and which the grand jury returned *ignoramus*. *Tate v. Humphrey*, 73 n

18. In replevin, the declaration of the person under whom the defendant makes cognizance, are not evidence for the plaintiff. *Hart v. Horn*, 92

19. A licence is *prima facie* evidence, that when a ship left her port of outfit, she sailed upon the voyage insured. *Marshall v. Pucker*, 69

20. On proof that goods which cannot be exported without a licence, where entered for exportation at the custom-house, it will be presumed that there was a licence to export them. *Van Omeron v. Dowick*, 44

FACTOR.

See PRINCIPAL AND AGENT, SALE,
SETT-OFF.

FOREIGN ATTACHMENT.

1. To prove that the defendant, under process of foreign attachment, has paid a sum of money to a creditor of the plaintiff, the record of the cause in the Mayor's Court, with an entry of satisfaction, is conclusive evidence. *Huxham v. Smith*, 19
2. The record is only *prima facie* evidence that the debt for which the action was brought in the Mayor's Court, arose within the limits of the city. *Ib.* 19
3. If a merchant abroad orders goods of a shop-keeper residing within the city of London, to be put on board a ship

a ship lying beyond the limits of the city, and the shop-keeper sends them from his shop to be shipped in pursuance of the order, the price of the goods may be sued for in the Mayors' Court as a debt arising within the city, *Ib.* 21

FOREIGN JUDGMENT.

1. An action may be maintained upon a foreign judgment obtained by default, which states that the defendant appeared by attorney,—without proving that the attorney mentioned had authority to appear, or that the defendant was living within the jurisdiction of the foreign Court. *Molony v. Gibbons,* 502

FOREIGN SENTENCE.

See INSURANCE.

The sentence of condemnation of a foreign court of Admiralty cannot be received in evidence, without previous proof of the ship having been captured. *Marshall v. Parker,* 69

FRAUDS, STATUTE OF.

See PRINCIPAL AND AGENT, 3.

1. A memorandum of the sale of goods under the 17th section of the statute of frauds, cannot be signed by one of the contracting parties as the authorized agent of the other: the agent must be a third person. *Wright v. Danah,* 203
2. A tenancy from year to year created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly. *Mollett v. Brayne,* 97

FREIGHT.

See SHIP.

1. Freight cannot be recovered on a

charter-party, unless the stipulated voyage has been actually performed: and there is no implied promise to pay a compensation for carrying goods a part of the voyage, unless they are voluntarily accepted at a place short of the port of destination. *Osgood v. Groning,* 466

2. If by a bill of lading goods are made deliverable to A. or his assigns, he or they paying freight for the same, and A assigns the bill of lading to B. and B. assigns it to C., who accepts the goods under it, C. is liable to an action for the freight at the suit of the master of the ship. *Cock v. Taylor,* 587
3. A ship let to freight by the month in attempting to enter a blockaded port by order of the freighters, is seized, and her cargo condemned; but being afterwards released, takes in other goods and delivers them to the freighters, according to the charter-party: *Held,* that there was no suspension of the freight during the detention of the ship. *Moorsom v. Greaves,* 697

GAZETTE.

See EVIDENCE 1.

GUARANTIE.

See BILLS OF EXCHANGE, 5.

1. If B. by a written guarantee undertake to A. to answer for the payment of goods to be sent by him to C., A. cannot maintain *indebitatus assumpsit* against B. for the price of goods sent to C. accordingly, but must declare specially on the guarantie. *Mincs v. Sculthorpe,* 215
2. Where by a written guarantie, A. becomes bound to B. for any debt C. may contract with him, not exceeding 100*l.* the guarantie is not extinguished by one dealing between B. and C. to that amount; but extends to any debt of 100*l.* which C. may after-

afterwards owe to B. *Merle v. Wells.* 413
 3. A garantie for the payment of any goods to be supplied to a third person to a special amount, remains in force after goods to this amount have been supplied and regularly paid for, until the surety gives notice that he will be no longer responsible. *Mason v. Pritchard,* 436

HAWKER.

A licenced hawker who gives his licence to be used by his servant employed to sell goods on his account, is not liable on 29 C. 3. c. 26. as for letting to hire or lending the licence. *Hodgson q. t. v. Flower,* 288

HERALD.

1. *Windsor Herald and Blue Mantle Pursuivant at Arms* may maintain a joint action for work and labour in making out a pedigree, both having been on duty when the order for it was given, although only one of them was applied to by the defendant. *Townsend v. Neal,* 190
 2. In such an action the plaintiffs are bound to give general evidence of the pedigree being true, unless this has been dispensed with by the defendant. *Ib.* 191

HIGHWAY.

See EVIDENCE, 11.

HORSE.

1. Roaring is not unsoundness in a horse unless it be shewn to proceed from some disease or organic defect. *Basset v. Collis,* 523
 2. A servant employed to sell a horse, and receive the price, has an implied authority to warrant the horse to be sound; and in an action upon the warranty, it is enough to prove that it was given by the servant, without

calling him, or shewing that he had any special authority for that purpose. *Alexander v. Gibson,* 555
 3. In an action on the warranty of a horse, the plaintiff is not entitled to recover for the expence of keeping the horse, unless, on discovering the unsoundness, he offered to return him to the defendant. *Caswell v. Coare,* 82

INDEBUTATUS ASSUMPSIT.

See ACTION, 10.

GURANTEE.

INDICTMENT.

See EVIDENCE, 11.

1. An indictment will not lie for words spoken of a justice of the peace in his absence. *Rex v. Weltje,* 142
 2. A conspiracy to obtain money by procuring from the Lords of the Treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. *Rex v. Postman,* 229
 3. It is an indictable offence for a man to undress himself on the beach and to bathe in the sea, near inhabited houses, from which he may be distinctly seen; although these houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question. *Rex v. Crunden,* 89
 4. If an overseer of the poor receive from the putative father of a bastard child born within the parish, a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish. *Rex v. Martin,* 268
 5. If a banker permits a sum of money to

to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment and to receive the money. *Rex v. Pollman,* 233

6. An indictment against a master for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, must alledge that the servant was of tender years and under the dominion and controul of the master. *Ito. c. Ridley,* 650

7. An indictment against A., B., C., and D., charged, that they conspired together to obtain, "viz. to the use of them the said A., B., and C., and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Held, that the averment concerning the application of the money was material, though coming under a *viz.* and that as to D. the conspiracy was not proved as laid. *Rex v. Pollman,* 231

8. There is no objection of any sort to trying a man, upon one indictment, for several distinct misdemeanours of the same nature. *Rex v. Jones,* 131

9. A person indicted for a misdemeanour or a felony, may be legally convicted upon the uncorroborated evidence of an accomplice. *Rex v. Jones,* 132

10. The defendant may be found guilty upon a count in an information which charges him with having "composed, printed, and published" a libel, if he is proved to have published without having composed it. *Rex v. Hunt,* 583

11. If the defendant is charged by a count in an indictment with having "composed, printed and published" a libel, if the evidence be, that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing. *King v. Williams,* 646

INFORMATION.

See INDICTMENT.

INSOLVENT DEBTORS ACT.

After the 1st day of February, 1809, a promissory note was given for an antecedent debt. Held, that as against the payee, the maker would have been discharged under the insolvent debtors act; 49 Geo. III. c. 115; but that he was not, as against a person to whom the note was subsequently indorsed. *Lucus v. Winton,* 443

INSURANCE.

See EVIDENCE. FOREIGN SENTENCE.

1. The capture of property in a conjunct expedition by the navy and army, against a fortress on the land, since 45 G. 3. c. 72. have an insurable interest before condemnation. *Stirling v. Vaughan,* 225

2. A policy of insurance on money lent to the Captain payable out of the freight is illegal and the premium cannot be recovered back from the underwriters. *Wilson v. R. & A. Co.* 626

3. Policy at and from the Island of St. Michael's. The ship arrived there in a very disabled state, and after lying at anchor above 24 hours in great danger from a storm, was blown out to sea and wrecked.—Held that the policy on the homeward voyage never attached. *Parmater v. Cousins,* 235
4 Policy

4. Policy from London to a foreign port, "on goods as should thereafter be declared, each package to pay average, the same as if it were separately insured." A small quantity of naval stores was afterwards mentioned in the specification of interest, and exported in the vessel with the other goods insured, without a licence, contrary to a proclamation authorized by 33 G. 3. c. 2. *Held*, that the policy was entirely vitiated, and that the assured could not recover for that part of the goods the exportation of which was legal. *Parkin v. Dick*, 221

5. A voyage to a Prussian port is not illegal as being a trading with an enemy, although our commerce is entirely excluded from the ports of Prussia, and there be no diplomatic intercourse between the two countries. *Muller v. Thompson*. 610

6. A policy of insurance is not vitiated by giving leave to the ship to proceed to any port in a particular sea in which there are both hostile and neutral ports, unless it can be shewn that it was intended the ship should in fact proceed to one of the former. *Ib.*

7. An insurance is declared to be "on the cargo, being 1031 hds. wine." This does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods shall be taken on board. *Ib.*

8. Policy at and from Riga to the United Kingdom, on ship and freight, declared to be *in continuation* of two other policies, which were on ship and freight on a voyage from the United Kingdom to the ship's port of discharge in the Baltic, during her stay there, and from thence back to her port of discharge in the United Kingdom. The ship was seized and condemned at Riga before she had discharged her outward cargo. *Held*, that the first policy could not be applied to the outward freight. *Bell v. Bell*, 475

9. It is stipulated by a policy of insurance from Riga to the United Kingdom, "that if the ship should not load a cargo at Riga by any act of the Russian government, the assured were to receive a total loss." The ship is seized and condemned by the Russian government before her outward cargo is discharged. This is a total loss within the meaning of the policy. *Ib.*

10. A policy at and from a foreign port, attaches when the ship has arrived there in good physical safety, although, from political causes, she may be in great danger of condemnation. *Ib.*

11. Policy "at and from Sheerness in ballast to Charente, and back to a port in the British channel and London; from the date thereof, till the ship should be arrived at Charente and back at a port in the Channel and London; on freight valued at the sum insured, to be deemed interest in the outward voyage, altho' in ballast." The ship was freighted for the voyage in question by a charter-party, whereby she was to proceed to Charente in ballast, and there the freighter was to provide her with a full cargo of brandy. On the arrival of the ship at Charente she was put under an embargo, and after being so kept for six months, she was seized and condemned by the French government. *Held*, that the freight was protected by the policy while the ship lay at Charente before any goods were put on board, and that the underwriters were liable for a loss so happening. *Mackenzie v. Sheddron*, 431

12. If a ship insured, on arriving off her port of destination, is prevented from entering it, from its being in the hands of the enemy, or from being

being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. *Parkin v. Tunno*, 59

13. Goods insured to *A*, that port being in the hands of the enemy, are carried to *B*, and afterwards to *C*. Their condition being here inspected for the first time from the original sailing of the ship, they are found to be almost entirely destroyed by sea-damage, which might have happened partly in the voyage to *A*, or entirely in passing from *A* to *C*. The underwriters are not liable for any part of this loss, there being no distinct evidence that the goods were injured while they were protected by the policy. 59

14. In an action on a policy from an English to a foreign port, to found a presumption that the ship was lost on the voyage, it is enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to shew that she never arrived there. *Twemloe v. Oxzin*, 85

15. In an action on a policy of insurance, where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the plaintiff must prove that when she left the port of outfit she was bound upon the voyage insured.—For this purpose the *voyage bond*, mentioning the port of destination in the common form, is *prima facie* evidence. *Cohen v. Hinckley*, 51

16. The Royal Exchange Assurance Company is liable for a total loss upon a cargo of corn, where the ship from the perils insured against, becomes incapable of pursuing the voyage, and another vessel cannot be procured to forward the corn to its port of destination. *Wilson v. R. E. Ass. Co.* 623

16. Where a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, this is a *total loss* of ship, cargo and freight, however inconsiderable the damage sustained may be, because the voyage in contemplation is lost. *Manning v. Newnham*, 624 n

18. The owner of a cargo of flax-seed insured "at and from America to Limerick," himself residing at that place, on the 11th of February 1808, received information that the ship with the flax-seed on board had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th of June following. The flax-seed was intended for sowing, and might have been employed for that purpose, had it arrived before the 10th of May, but afterwards would have been scarcely of any value. Held, that however the plaintiff might have waited till the 10th of May before abandoning, the abandonment on the 11th of June was out of time. *Kelly v. Walton*, 155

19. Goods protected by a valued policy, being captured, are condemned as lawful prize, *the captors paying the freight*. The assured may nevertheless recover as for a total loss. *Marshall v. Parker*, 69

20. If a ship insured is merely represented as neutral, a sentence of a foreign court of admiralty, condemning her for a violation of the laws of neutrality, is not evidence to falsify the representation. *Von Tungeln v. Du Bois*, 151

21. A representation made to any underwriter except the first on the policy, is not to be considered as made to subsequent underwriters. *Bell v. Carseurs*, 543

22. The master of a merchantman while taking in his loading at a foreign

reign port, is ordered by the captain of a King's ship to go out to sea to examine a strange sail discovered in the offing, bearing enemy's colours; Without remonstrating, and without any force or threats being employed to influence his determination, he obeys; and finding the strange sail, to be a neutral, he returns to port. *Held*, that this was an unexcused deviation, which vacated a policy or goods on board the merchantman. *Phelps v. Aulijo*, 350

23. The assured on a policy at and from Riga, are in possession of a letter from their correspondent there, stating that an order for sending the papers of all ships arriving at that port to Petersburgh had produced a great sensation, intimating that the papers of the ship insured had been sent to Petersburgh accordingly, and expressed considerable apprehensions for her safety. This letter is not communicated to the underwriters; but the broker informs them of the fact of the ship's papers being sent to Petersburgh. *Held*, that the policy was not vitiated on the ground of concealment by the non-communication of the letter. *Bell v. Bell*, 479

24. When a ship insured is captured in a voyage to an enemy's country, and the British licence legalizing the voyage is lost, to shew that she had such a licence, it is necessary to prove the loss of the paper purporting to be a licence put on board the ship, and to produce examined copies of the order in council for granting the licence, and of the copy of the licence preserved in the secretary of state's office. *Eyre v. Palgrave*, 605

25. If in a policy of insurance "at and from Surinam, and all or any of the West India Islands to London," the ship is warranted to sail *on or before the 1st of August*, it is sufficient com- pliance with the warranty if she sail on or before that day from her fixed port of loading on the homeward voyage, although she afterwards touch at one of the West India islands to join convoy. *Wright v. Schiffner*, 247

26. A warranty in a policy of insurance against *capture in port* does not protect the underwriters from a loss happening by capture in a place which is not within the limits of my port, although it may be within the headlands at the mouth of a river. Therefore where a ship insured from Rotterdam to London, and "warranted free from capture in port," was captured while lying at anchor near Ghoree in the River Maes, the underwriters were held liable. *Baring v. Vaux*, 511

27. If by a policy of insurance the ship is warranted "free of capture and seizure in her port or ports of discharge," and she is taken in an open river not within the limits of any regular port, waiting for an opportunity there to discharge her cargo in a clandestine manner, the place where she is taken is to be considered her port of discharge within the meaning of the policy, and the underwriters are not liable for the loss. *Jarman v. Coape*, 613

28. *Sensible*, that if a declaration on a policy of insurance lay the loss by the perils of the seas, the plaintiff may recover upon proof that the ship was wrecked, although this may have been occasioned by the *burratry* of the master of mariners. *Hayman v. Parish*, 149

29. A count on a policy of insurance laying the loss by *captures*, is sustained by evidence, that the ship was captured by a privateer, although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff

plaintiff might have recovered under a count laying the loss by the *baratry* of the master. *Arcangelo v. Thompson,* 620

30. To prove a warranty, that a ship insured was of a particular nation, it is *prima facie* evidence, that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port, *Ib.*

31. The production of a letter dated abroad, and addressed to J. S. in England, with the English ship letter post-mark upon it, which directed a policy to be effected, is sufficient to prove that J. S. was "the person residing in Great Britain, who received the order for and effected such policy." *Ib.*

INSURANCE BROKER.

See LIEN, 1, 2. PRINCIPAL AND AGENT. SET OFF.

INTEREST.

See BANKERS, 2.

1. In an action for money had and received to recover a sum paid by a third person into the defendant's hands, for the plaintiff's use, the plaintiff is not entitled to interest. *De Bernales v. Fuller,* 462

The rule upon this subject in *De Havilland v. Bowerbank, 1 Campb. 50.* confirmed by the Court of K. B. *Ib.*

2. In the Exchequer Chamber, interest will be allowed in an action for not giving a bill of exchange in payment of goods sold from the time when the bill, if given, would have become due. *Bucher v. Jones,* 428 n

3. When goods are sold to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is intitled to interest from the time the bill, if given, would have

become due. *Porter v. Palsgrave,* 472

4.—Whether the defendant has or has not accepted the goods. *Boyce v. Warburton,* 480

5. But where there was no agreement to give a bill, interest ought not to be allowed in an action for goods sold and delivered, to be paid for at a certain day. *Gordon v. Swan,* 429 n

LANDLORD AND TENANT.

See EJECTMENT. FRAUDS, STATUTE OF. NOTICE TO QUIT. TREES. USE AND OCCUPATION.

LEASE.

If an instrument professing to be an agreement for a lease, when taken altogether, appears intended to transfer possession and a present interest in the premises to the tenant, it will be treated as a lease, although it contain a stipulation for subsequently executing a lease under seal. *Poole v. Bently,* 286

LIBEL.

See INDICTMENT, 10, 12.

1. It is libellous to publish the preliminary examinations taken *ex parte* before a magistrate previous to committing a man for trial or holding him to bail for an offence with which he is charged; the tendency of such a publication being to prejudice the minds of jurymen against the accused, and to deprive him of a fair trial. *Rex v. Fisher,* 563

2. It is not libellous for a writer who allows the Sovereign to be solicitous for the welfare of his subjects, and who has no intention of calumniating him or of bringing his personal government into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy. *Rex v. Lambert,* 398

3. On

3. On the trial of an information for a libel in a newspaper, the defendant had a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter and printed in a different character. *Rex v. Lambert,* 398

4. It is not a bar to an action for a libel, that the plaintiff has been in the habit of libelling the defendant. *Finnerty v. Tipper,* 76

5. In an action for a libel, the plaintiff cannot give in evidence other libels, published concerning him by the defendant, unless they directly refer to the libel set out in the declaration. *Finnerty v. Tipper,* 72

6. In an action for a libel, the defendant, under the general issue, may prove, in mitigation of damages, that before and at the time of the publication of the libel, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that on account of this suspicion, his relations and acquaintance had ceased to associate with him. *Earl of Leicester v. Walter,* 251

7. Q. Whether action will lie for destroying a libellous picture? *Du Bost v. Beresford,* 511

LICENCE.

*See ALIEN ENEMY. EVIDENCE, 10,
20. INSURANCE, 24.*

LIEN.

1. *A.*, a merchant, at different times, employs *C*, an insurance broker, to effect policies of insurance for him: *C*, without *A*'s concurrence, employs *B*, another insurance broker, to effect these policies, informing him that they were for a correspondent in the country: *B* gets the policies effected in *A*'s name, and delivers them all, except one, to *C*:

C becomes bankrupt, without having paid *B* any part of the premiums, and *A* being indebted to his estate beyond the amount.—*Held*, that *B* had not a lien on the policy he detained for the general balance due to him from *C*, and that *A* could maintain trover for this policy against *B*, after tendering him the premiums and commission due in respect of it alone. *Snook v. Davidson,* 218

2. If an agent, employed to effect an insurance on goods represents himself as the owner of the goods to another person whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent. *Lanyon v. Blanchard,* 597

3. The master of a ship has a lien on the luggage of a passenger for his passage money. *Wolf v. Summers,* 631

LIMITATIONS, STATUTE OF.

1. If a cause of action arising from the breach of a contract to do an act at a specific time, is once barred by the statute of limitations, a subsequent acknowledgment by the party, that he broke the contract, will not take the case out of the statute. *Boydell v. Drummond,* 160

LONDON DOCKS.

See SHIP, 1, 2, 3.

LOST BILL.

See BILLS OF EXCHANGE, 1, 2.

MALICIOUS ARREST.

*An action cannot be maintained for a malicious arrest by *A* against *B*, if *A* owed *B* the sum for which he was held to bail, although *B* was indebted to *A* to a larger amount. *Brown v. Pigeon,* 594

MALICIOUS PROSECUTION.*See VARIANCE, 1.***MARKET OVERT,***See SALE, 3.***MISDEMEANOR.***See INDICTMENT.***MISNOMER,***See BAIL BOND, 2.***MONEY HAD AND RECEIVED.***See ASSUMPTION IMPLIED, 1.*

1. *A.* residing at X. employs *B.* residing at Y. to procure payment of a bill there, and to remit the produce direct to him at X.—*B.* receives payment of the bill, but remits the produce to a third person at Z. for *A.*'s use, whereby the whole gets into the hands of *A.*'s creditors. *A* cannot maintain an action for money had and received against *B.* to recover the amount of the sum received in payment of the bill. *Duncan v. Skipwith,* 68

2. If goods are delivered generically of the sort ordered, the price cannot be recovered back in an action for money had and received as upon a failure of consideration, however bad their quality may be, and although they are quite unfit for use. *Torture v. Lingham,* 416

NEUTRAL.*See ACTION, 3.***NOTICE OF ACTION.**

A notice to magistrates under 24 G. 2. c. 44. need not specify the form of action to be brought. It is sufficient if it states the writ or process, and the cause of action. Sabin v. De Burgh, 196

VOL. II,**NOTICE TO PRODUCE.***See EVIDENCE, 9, 14.***NOTICE TO QUIT.***See EJECTMENT.*

1. If a tenant from year to year holds from *Old Michaelins*, a notice to quit "at Michaelmas" generally, is good. *Doe v. Fince,* 257

2. If an ejectment by a corporation against a tenant from year to year, a notice to quit given by a person acting as steward of the corporation, is sufficient, without evidence that he had an authority under seal from the corporation for this purpose. *Ros v. Pierce,* 96

3. If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit expiring at the end of the first year. *Thompson v. Maberley,* 573

4. Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice to quit is not thereby waived. *Doe v. Calvert,* 386

5. Premises are let from year to year, upon an agreement, that either party may determine the tenancy, by a quarter's notice. This notice must expire at that period of the year when the tenancy commenced. *Doe d Pitcher v. Donovan,* 78

6. A notice was given on the 22d of March, by a landlord to his tenant to quit at the expiration of the current year. A declaration in ejectment laying the demise on the 1st of November, was on the 16th of January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself. This held to be *prima facie* evidence. *Y* has

that the tenancy commenced at Michaelmas and was determined before the day of the demise. *Doe v. Baker, v. Woombervell,* 559

7. A notice to quit is not of itself *prima facie* evidence of the period of the year when the tenancy commenced. *Doe v. Calvert,* 388

8. But if a notice to quit is served personally on the tenant in possession, and he makes no objection to it, this is *prima facie* evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expired. *Thomas v. Thomas,* 647

NOTICE OF TRIAL.

See PRACTICE, 5.

O. P.

See THEATRE.

PARISH.

See VENUE.

1. The parishes of A. and of B. being united by act of parliament for the maintenance of their poor, but for no other purpose;—it is a fatal misdescription in ejectment to state premises which are actually within the parish of A. as situate in the *united parishes of A. and B.* *Goodtitle v. Lammiman,* 274

2. *In trespass quare clausum fregit*, where the locus in quo is stated to be in *the parish of A.* it is enough if A. has a church and overseers of its own, and is reputed a parish, although perhaps strictly speaking it may be only a hamlet, 5 n

PARTICULAR OF DEMAND.

See PRACTICE 3. "

PARTNERS.

See BILLS OF EXCHANGE.

1. A father established in business, on his

son's coming of age, tells him he shall have a *share* in it, and holds him out to the world as his co-partner: The son acts as such for several years; but there is never any thing settled as to the particular share which he shall have.—Under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers: but *not* that the son is entitled to a moiety of the profits; and it will be referred to a jury to say, to what share he is reasonably entitled. *Peacock v. Peacock,* 45

2. A merchant carrying on trade on his own separate account, introduces into his firm the name of a clerk who has no participation in profits or loss, but continues to receive a fixed salary. Held then in an action on a bill of exchange payable to the order of this firm, the clerk, must be joined as a plaintiff. *Guildon v. Robson,* 302

3. If one of several partners promises individually to pay a debt, he will not be allowed to show that it was due jointly from himself and his co-partners. *Murray v. Somerville,* 99 n

4. If A. and B. are in partnership, and C. owes them a sum of money on the partnership account, a receipt for this given by A. upon setting off a private debt due from himself to C. will be *a bar* to an action by A. and B. against C., for the debt due to the partnership; but, if after a dissolution of partnership between A. and B., and a notice in the Gazette that all debts due to the partnership shall be paid to B. A. collusively gives C. a receipt for the debt, dated anterior to the dissolution of the partnership, the receipt is void, and an action may still be maintained against C. for the debt, in the names of A. and B. *Henderson v. Wind,* 561

5. If

5. If after a dissolution of partnership, and notice of this published in the London Gazette, and sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership. *Neesome v. Coles*, 617

6. There is in an agreement between A. B. and C., the proprietors of a stage coach, who divide the general profits of the concern, that they shall each work the coach a stage with horses, their separate property, and maintained respectively at their separate expence. Held at N. P. that B. and C. were jointly liable as co-partners with A. for the price of his furnished at A.'s request for the use of the horses which were his separate property, but were kept by him for the purpose of working the coach the stage allotted to him under the agreement. *Barton v. Harrison*, 97. Overruled by the court of C. P. who granted a new trial. 2 *Taint.* 49

PATENT.

See TIME.

PAYMENT OF MONEY INTO COURT.

In *indebitatus assumpsit* for goods sold, payment of money into court after a particular stating that the action is brought for the price of a certain lot of goods sold to the defendant on such a day by A. B. the plaintiff's broker, does not admit that the goods purchased by the defendant of A. B. on the day specified, were the property of the plaintiff. *Blackburn v. Scholes*, 311

In an action of covenant, if money be

paid into court on any one of the breaches, it is unnecessary to prove the deed. *Randall v. Lynch*, 356

PENALTIES.

See APPREHENSION. HAWKER. USURY.

PERJURY.

1. If a count in an indictment for perjury undertake to set out continuously the substance and effect of what the defendant swore when examined as a witness; it is necessary, in support of this count, to prove, that in substance and effect he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. *Rex v. Leece*, 134

2. In an indictment for perjury before a select committee of the house of Common, it was avvred, that an election was held for a borougn "by virtue of a certain precept of the high sheriff of the county by him duly issued to the baillif of the said borougn of N. Y." Held, that this was not a description of the precept, and that although the borougn was therein differently denominated, the variance was immaterial. *Rex v. Leece*, 139

3. But the indictment having stated that "A. B. and C. D. were ordained to serve as burgesses for the said borougn of N. M." this was considered a description of the indenture of return, and the borougn being therein styled the borougn of M. the variance was held fatal. *ib* 141

4. In an indictment for perjury in an answer to a bill in Chancery, the Bill was stated to have been filed by A. against B. (the now defendant) and another. In fact it was filed against B. C. and D., but the perjury was assigned on a part of the answer which

was material between A. and B.—This held not to be a fatal variance. *Ib.*

5. On an indictment for perjury in an answer to a bill in Chancery it is sufficient evidence of the defendant having sworn to the truth of the answer, to prove his signature to it, and the signature of the Master in Chancery before whom it purports to be sworn. *Rex. v. Benson.* 508

PHYSICIAN.

If a medical practitioner passes himself off as a physician, although he has no diploma, and no right to assume that character, he cannot maintain an action for his fees. *Lipscombe v. Holmes.* 441

PLEADING.

See BILLS OF EXCHANGE 10. GUARANTIE. INSURANCE, 28, 29. MONEY HAD AND RECEIVED, 1.

1. To trespass for breaking and entering a house and staying therein three weeks, the defendant pleads a justification as to breaking and entering and staying in the house 24 hours. The plea covers the whole declaration. *Monprivatt v. Smith.* 175
2. Q. If to trespass for destroying a picture, the defendant may plead, that it was a scandalous libel upon individuals, and that being publicly exhibited, he cut it to pieces by way of abating a nuisance? *Du Bost v. Beresford.* 511
3. A writ directed generally to the sheriff of a county, may be described in pleading as directed to the individual by name, who was in fact sheriff of the county when the writ issued. *Bachelot v. Salmon.* 525
4. An action brought to recover a particular sum of money, may be described in pleading “as an action for ‘the recovering of the said sum of

“money”, although in form it was an action of *trotter*, 526.

5. If to trespass by a tenant against a landlord for turning him out of possession, the defendant pleads a fact by which the lease was forfeited, and the plaintiff replies generally *de injuria;* when the fact is proved by which the lease was forfeited, the plaintiff cannot give in evidence a waiver of the forfeiture; but he ought to have replied this specially in avoidance of the plea. *Warratt v. Clare.* 629

POLICY.

See INSURANCE.

PRACTICE.

1. When there are several counsel on the same side, and a junior has begun to examine a witness, the leader may interpose, take the witness into his own hands, and finish the examination. But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doc. v. Roe.* 280
2. Counsel, although retained for the plaintiff, cannot withdraw the record till a brief is delivered. *Abitol v. Benedutto,* 487
3. Where an action is brought to recover the balance of an account, a particular of the plaintiff's demand delivered under a judge's order ought to give the defendant credit for payments admitted to have been made by him, and to state the exact sum which the plaintiff goes for. *Allington v. Appleton.* 420
4. In an action by the Assignees of a bankrupt, the notice under 49 G. 3. c. 121, s. 10, that the defendant means to dispute the validity of the commission, is not to be considered as part of the defendant's regular evidence

evidence in the cause, but may be proved at the beginning of the trial, and immediately puts the plaintiff upon strict proofs of the trading, petitioning creditor's debt, and act of bankruptcy. *Decharme v. Lanc.*, 324
 5. Notice of trial may be given in K. B. for the adjournment day in London, and it is sufficient to give such notice 8 days in country causes and 4 days in town causes, before the first sittings after term. *R. G. E.* 1811. xii.

6. Rule for *special jury* in Middlesex and London must be served day preceding adjournment day, and cause then marked as special jury in marshal's book. *R. G. H.* 1804.—xii.

PREMIUMS OF INSURANCE.

See Insurance 2.

PRINCIPAL AND AGENT.

See Horse, 2. Linen, 2. Set-off.

1. Where a broker is authorized by one man to sell goods, and to buy such goods for another, an entry in his books of a sale of these goods from the one to the other, signed by him, is in general a binding contract between the parties. *The bought and sold note*, which is a copy of this entry, is not sent to the parties for their approbation, but to inform them of the terms of the contract. *Heyman v. Ncale.* 337

2. But if goods in the city of London are sold by a broker, *to be paid by a bill of exchange*, the vendor has a right, within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract. The vendor, however, must intimate his dissent as soon he has had an opportunity to inquire into the solvency of the purchaser.—Five days considered too long a period for this purpose. *Hodgson v. Davies,* 530

- 3. The authority of the broker may be countermanded at any time before a memorandum of the contract of sale is written and signed by him, pursuant to the Statute of Frauds, although he has previously entered into a verbal agreement to sell the goods. *Foster v. Robinson,* 329 n.
- 4. If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it. *Bowfield v. Creswell,* 545
- 5. If an insurance broker living at a distance from his principal, upon a loss happening, gives him credit in account for the money due from the underwriters, he cannot a considerable time after make a demand upon him for the amount of the sums subscribed by several of the underwriters who have become insolvent without paying. *Jameson v. Swainstone,* 546 n.
- 6. If goods are sold by a broker without disclosing his principal, the purchaser is justified in paying him in a different manner from that stipulated for by the terms of the contract.—*Adler*, where the principal is disclosed at the time of sale. *Blackburn v. Schleser,* 343
- 7. The circumstance of persons selling goods being described in the catalogue of sale as *sworn brokers*, is not sufficient notice to the purchaser that they are only agents, to prevent him from dealing with them as principals. Ib.
- 8. Although a factor sell goods as a principal, yet, if before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person; in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor. *Moare v. Clementson,* 22

PROCLAMATIONS.

A Judge at nisi prius will not take judicial notice of the king's proclamations. *Von Omeron v. Dowick*, 41

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROPERTY TAX.

See USE AND OCCUPATION.

PROTEST.

See BILLS OF EXCHANGE, 28, 32.

PUBLICAN.

An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced, unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers. *Holcome v. Heeson*, 391

2. In an action on this agreement, the quality of the beer cannot be proved by shewing what sort of a commodity the brewer furnished to other publicans during the same period. *Ib.*

RECEIPT.

See PARTNERS, 4. STAMP.

RE-EXCHANGE.

1. Bills of exchange upon Lisbon were indorsed by *A.* to *B.* in this country, and afterwards by *B.* to *C.* a merchant at Lisbon. When the bills became due, Lisbon was in the hands of the French and they were dishonoured. *C.* re-drew upon *B.* in London, but *B.* did not honour the re-drafts. It did not appear clearly whether at that time there was an established course of exchange between Lisbon and Lon-

don. In an action by *B.* against *A.* upon the bills, the plaintiff's claim to re-exchange was disallowed by the jury, and the court afterwards refused to set aside the verdict upon that ground. *Dc Tastet v. Baring*. 65

2. The acceptor of a foreign bill of exchange is not liable for re-exchange, nor for more than the principal sum, together with interest according to the legal rate of interest where the bill is payable. *Woolsey v. Crawford*, 445

REGISTER.

See SMI, 6, 7, 8.

REPRESENTATION.

See DECEITFUL REPRESENTATION. INSURANCE, 20, 21.

SALE.

See CARRIER. PRINCIPAL AND AGENT.

If there be a contract for the sale of goods by a particular ship *on arrival*, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty, without any default on the part of the vendor, he is not liable to the purchaser for the non-delivery of the goods. *Boyd v. Siffkin*, 326
Hawes v. Humble, 327 n

2. *A.* sold to *B.* all the hemp that might be shipped on board certain vessels at Riga not exceeding 300 tons, by *C.* the agent of the concern. *C.* shipped on board of these vessels only 71 tons of hemp on account of *A.*, but upwards of 300 tons on account of other persons. Held, that the contract must be confined to such hemp as *C.* should ship as agent to *A.*, and that *A.* was not answer-

answerable to *B.* for more than the 71 tons. *Hayward v. Scougal,* 56

3. The owner of goods sends them to a wharf in the Borough of Southwark, where goods of the same sort are usually sold: The wharfinger, without any authority, sells them to a *bona fide* purchaser, who duly pays for them—This is not a sale in *market overt* to change the property, and trover lies for the goods at the suit of the owner against the purchaser. *Wilkinson v. King,* 335

4. Goods sold remain at the risk of the seller while any thing is to be done to them by him to ascertain the amount of the price. Therefore where 289 bales of skins, (stated in the contract to contain 5 dozen in each bale) were sold at 57s. 6d. a dozen, and it was the duty of the seller to count over the skins to see how many each bale actually contained; but before any enumeration took place, the whole were consumed by fire;—held, that an action could not be maintained against the purchaser for the value of the skins, and that the loss fell entirely upon the seller. *Zagury v. Furnell,* 240

5. A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgement that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is re-measured, and that before the malt in question was re-measured, the seller became bankrupt. *Stonard v. Dunkin,* 311

6. If it is stated generally in a bought and sold note that the goods are to be paid “*by bill*” evidence cannot be received to shew, that *by bill* is meant an *approved bill*: and sensible that an *approved bill* is a bill to

which there is no reasonable objection, and that ought to be approved.

532

SEAMEN'S WAGES.

1. In an action for seamen's wages the plaintiff may under 2. G. 2. c. 36, give evidence of the contents of the ship's articles, without having served a notice to produce them. *Bowman v. Manzelman,* 315

2. A seaman at monthly wages, who is impressed or enters from a merchant ship into the royal navy during a voyage, is not entitled to wages to the time of his quitting the ship, unless the voyage be completed. *Anon,* 320 n

3. In the course of a voyage some of the seamen desert, and the captain not being able to find others to supply their place, promises to divide the wages which would have become due to them among the remainder of the crew. This promise is void for want of consideration. *Stilk v. Myrick,* 317

4. Where it is provided by a ship's articles that any of the crew who shall absent themselves from the ship without leave shall forfeit their wages, if, after one of the crew has so absented himself, the master receives him back again and allows him to work like the others, the forfeiture is waived, and the wages are recoverable. *Miller v. Brant,* 590

SET OFF. 8.

See PRINCIPAL and AGENT, 8.

In an action for premiums by an underwriter against an insurance broker, a loss may be set off that has happened upon a policy subscribed by the plaintiff to the defendant, which the latter effected with a *det credere* commission. *Wienholt v. Roberts,* 586
Y 4. SHERIFF

SHERIFF, 4, 5.

*See ACTION, 10. EVIDENCE, 4, 5.
PLEADING, 3.*

SHIP.

See EVIDENCE. FREIGHT. LIEN, 3.

1. If by reason of the crowded state of the *London Docks*, a ship is detained there before she can be unloaded, a longer time than is allowed for that purpose by the terms of the charter-party, the freighter is liable for this detention to the owner of the ship. *Randall v. Lynch,* 352

2. If by a charter-party leave is given to detain the ship a certain number of days for the purpose of discharging her cargo, this amounts to a covenant on the part of the freighter, that he will not detain her longer. *Randall v. Lynch,* 356

3. If the freighter of a ship employed to bring a cargo of wine into the port of *London*, covenant to unload her in the usual and customary time at her port of discharge, he is not liable for the detention of the ship in the *London Docks*, if she is there unloaded in her turn into the bonded warehouses. *Rodgers v. Forresters,* 483

4. If by a bill of lading of a cargo of brandy brought into the *London Docks*, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee, is to discharge the ship in the usual and customary time for unloading such a cargo—which is the time within which the brandies can be unloaded in the Docks into the bonded warehouses. Therefore, the consignees not, under these circumstances liable to make compensation to the owner of the ship, in the nature of a demurrage, for any delay occasioned by the crowded state of

the *London Docks*, although the cargo might have been landed sooner, if the duties had been immediately paid. *Burmeister v. Hodgson* 488

5. If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough to make the owners liable for the non-delivery of goods to shew that they were put on board the ship to be carried in this voyage, unless it be proved that they were received on board by some person appointed or authorized by the owners. *Mackenzie v. Rose,* 482

6. The defendant purchased a ship taken in execution under a s. q. in the year 1805; but the legal title was not regularly transferred to him till 1810. In 1806 he entered into an agreement with the captain to let him the ship for three years at a certain yearly rent and in no way interfered with the management of the ship afterwards. Held, that the defendant was not liable for stores supplied to the ship during the three years, by order of an agent of the captain. *Frazer v. Marsh,* 517

7. To prove that *A.* is liable as a registered owner of a ship, entries in the custom house books of the port of *London* and of the out port to which the ship belongs, stating that she was transferred to *A.* by *B.*, the original owner, are not sufficient evidence. *Frazer v. Hopkins,* 171

8. In an action against several defendants, for stores supplied to a ship by order of the captain, the register obtained on the oath of one of the defendants is *prima facie* evidence of ownership against all. *Stokes v. Curne,* 339

9. The owners of a post office packet are liable for stores ordered by the captain who is appointed by the post-master-general. *Ib.*

10. The captain of a ship has no authority

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authority as such to agree to the substitution of another voyage in the place of one agreed upon between his owners and the freighters of the ship in England, and on which he has sailed to a foreign country. *Burgon v. Sharpe* 529

11. Although the captain of a ship find it impossible to reach his port of destination, he has no implied authority to sell the cargo in a foreign port into which he is driven for the benefit of the shippers; and if he does so, though acting *bona fide*, for the interest of all concerned, this is a tortious conversion for which the ship-owner is liable. *Von Omeron v. Dowick*, 42

12. If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent to the owner or the freighter to shew that this would be more or less than a fair compensation for the detention. *Moorsom v. Bell*, 616

SLANDER.
See LIBEL WORDS.

SPECIAL JURY.
See PRACTICE, 6.

STAGE COACH.

- In an action against the proprietor of a stage coach for negligence, whereby the coach broke down, and the plaintiff, travelling by it as a passenger, was hurt; to prove negligence, it is *prima facie* enough to give evidence of the coach having broke down;—from which negligence will be inferred. *Christie v. Griggs*, 79
- The proprietor of a stage coach is not answerable for any damage that may happen to a passenger from the coach being overturned by a mere accident,

11.

STAMP.

- A receipt for the price of a horse containing a warranty of soundness, may be read in evidence to prove the warranty, without an agreement stamp. *Skrine v. Elmore*. 47
- In an action for not delivering goods made by the defendant for the plaintiff in pursuance of an order, a memorandum in writing ordering the goods, but not proving the contract between the parties may be read as evidence without a stamp. *Ingraham v. Lea*, 522

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STOPPING IN TRANSITU.

See SALE, 3, 4, 5,

When the purchaser of goods has lodged an order to deliver them with the wharfinger in whose warehouse they lie, and the latter has transferred them in his books into the name of the purchaser, the vendor's right to stop them *in transitu* is gone, and the wharfinger is bound to hold them as the agent of the purchaser. *Harman v. Anderson*, 243. *Et per Curiam in Banco*. The same effect is produced, by the delivery-note being lodged with the wharfinger, without a transfer in his books. *Ib.*

SURGEON.

Semble, that notwithstanding 3 H. 8. c. 11. which enacts, that no one shall practise as a surgeon in London, or 7 miles round, without being licensed by the college of surgeons, under the

penalty of 5l. a month; a person who is not so licensed may maintain an action for business done as a surgeon within these limits, the statute containing no prohibitory clause: And at any rate, it is incumbent upon the defendant in such action, to give evidence that the plaintiff is not regularly licensed as the statute directs, *Cremare v. Le Clerc Bois Vadon*.

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THEATRE.

Although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are, in point of law, guilty of a riot. *Clifford v. Brandon*, 338

TIME.

A patent dated 10th May, contained a proviso that a specification should be enrolled within one calendar month next and immediately after the date thereof. The specification was enrolled on the 10th of June following — *Held* that the month did not begin to run till the day after the date of the patent, and that the specification was in time. *Watson v. Pears*, 294

TOLL.

A waggon returning from London loaded with dung, is not liable to be weighed

weighed and charged for overweight under 13 G. 3. c. 84. or 14 G. 3. c. 82. by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day. *Chambers v. Eaves*, 393

TREES.

1. A covenant in lease to deliver up at the end of the term all the trees standing in an orchard at the time of the demise, "reasonable use and wear only accepted," is not broken by removing trees decayed and past bearing, from a part of the orchard which was too crowded. *Doe d. Jones et ux. v. Crouch*, 419
2. Tenant for years cannot maintain trespass *de bonis asportatis* for timber cut down on the demised premises. *Evans v. Evans*, 491

TRESPASS.

See TREES, 2.

1. If the owner of a chattel gratuitously permit another person to use it, the owner may maintain trespass for an injury done to it, while it is so used. *Lotan v. Cross*, 464
2. If an injury is received from the immediate, though unintentional, act of another, the remedy is trespass, and not case; and the Court of K. B. will not permit this doctrine to be questioned on a motion for a new trial. 465
3. Trespass will lie for an irregular distress, where the irregularity complained of is not in itself an act of trespass, but consists merely in the omission of some of the forms required in conducting the distress,—such as procuring goods to be appraised before they are sold. The true construction of the provision in 11 G. 2. c. 19. § 19, that the party

may recover a compensation for the special damage he sustains by an irregular distress "*in an action of trespass or on the case*," is, that he must bring *trespass*, if the irregularity be in the nature of an act of trespass, and *case*, if it be in itself the subject matter of an action on the case. *Messing v. Kemble*, 115

4. A shop-keeper may maintain trespass for taking goods sent to him *on sale or Return*. *Colwill v. Reeves*, 575
5. To trespass for unmooring the plaintiff's barge, for the defendant having pleaded merely the *general issue*, cannot give in evidence that he removed it from a situation of danger by the plaintiff's authority: or that being frozen to the barge of a third person which the defendant was authorized to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of safety. *Millman v. Dolwell*, 378
6. In trespass for running with a cart against plaintiff's chaise, the defendant cannot give in evidence under *not guilty*, that the cart and the chaise were travelling on the high road in opposite directions, and that the collision between them happened from the negligence of the plaintiff, or from inevitable accident. *Knapp v. Salsbury*, 500
7. If A. for a fraudulent purpose mixes his goods with B.'s, still if they can be distinguished, he retains the property in them, and he may maintain trespass against a person who, having a right to take B.'s goods, ignorantly takes these goods of A. as part of B.'s. *Colwell v. Reeves*, 376

TRIAL, NOTICE OF.

See PRACTICE, 5.

TROVER.

TROVER.

*See Bills of Exchange, 23.**Lien, 2. Pleading, 4.*

TWO-PENNY POST.

See Bills of Exchange 14, 29.

VARIANCE.

See Bail Bond. Bills of Exchange.

PERJURY. PLEADING.

1. In an action for a malicious prosecution, an allegation in the declaration, that the person prosecuted was acquitted by a jury *in the court of our lord the king, before the king himself at Westminster, before the Chief Justice,* is not supported by a record, from which it appears that the trial took place before the Chief Justice at *Nisi Prius.* *Woodford v. Ashley,* 2.
2. A bill of exchange expressed on the face of it to be "*for value delivered,*" is stated in pleading to be "*for value received.*" This is not a material variance. *Jones v. Mars,* 308

3. If a declaration states that on such a day the defendant drew a bill of exchange, without alleging that it bore date on that date, the day in the declaration is immaterial, though not under a videlicet. *Coxen v. Lyons,* 307 n

4. But where the declaration alleged that the defendant on, &c. made his certain bill of exchange in writing, *bearing date the same day and year aforesaid,* and the real date of the bill was different, the variance was held to be fatal, 308 n

5. In an action by the indorsee against the acceptor of a bill of exchange, the declaration stated, that the payee indorsed it, *his own proper hand being thereunto subscribed.* It appeared that the payee's name upon the back of the bill, was written under his authority, by his wife. *Semble,* that

this is no variance; and at any rate the defendant is not at liberty to object that the indorsement is not in the hand writing of the payee himself, after a promise, with a knowledge of this circumstance, to pay the bill. *Helmsley v. Loader,* 450

6. In an action against the drawer of a "bill of exchange, the declaration stated, that the defendants made the bill "*their own proper hands being thereunto subscribed.*" In fact, their firm of "*A. & Co.*" was subscribed to the bill.—The judge refused to nonsuit for the variance. *Jones v. Mars,* 305

7. To support an allegation, that to an information in Chancery against *T. Eamy,* "*the answer of the said T. Eamy was filed,*" it is enough to put in an office copy of an answer to the information, entitled, "*the answer of T. Eamy,*" although this be signed *T. Eamy.* *Galler v. Turner,* 87

VENUE.

See PARISH.

1. In an action for suspending a lamp before plaintiff's house, to denote that he kept a brothel, the parish in which the declaration states the house to have stood and the tort to have been committed, is to be considered as venue merely, not as local description; and it is immaterial whether there be any such parish in existence. *Jeffries v. Duncomb,* 3 c.
2. If a man writes a letter with intent to provoke a challenge, seals it up, and puts it into the post-office in Westminster, addressed to a person in the city of London, who receives it there, the writer may be indicted for this offence in the county of Middlesex. *Rex v. Williams,* 506
3. In an action on 1 & 2 P. & M. for driving a distress out of the hundred, if

if the hundred in which the cattle were distrained be in one county and the hundred into which they were driven be in another, the venue must be laid in the latter county. *Pope q.t. v. Davies*, 266 Overruled by the Court of C. P. 2 *Taunt*. 252.

USE AND OCCUPATION.

1. In an action for use and occupation, where the defendant has come in under the plaintiff, he cannot shew that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person. *Bails v. Westwood*, 11
2. In an action for use and occupation, where the defendant did not come in under the plaintiff, the plaintiff can only recover rent from the time he has had the legal estate in him, although he may have had the equitable estate long before. *Cobb v. Carpenter*, 13 n
3. In an action for use and occupation, the property tax will not be deducted at Nisi Prius from the rent due. *Pocock v. Eastace*, 151

USURY.

1. *Semble*, that lending money *on continuation*, is usurious. *Smedley v. Roberts*, 697
2. A bill of exchange is void in the hands of a bona fide indorsee, if it was drawn in consequence of an usurious agreement for discounting it, although the drawer, to whose order it was payable, was not privy to this agreement. *Ackland v. Pearce*, 599
3. In an action on a bill of exchange, if it appear that the plaintiff discounted it for the defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff to prove, that the goods were of the value at which they

were estimated, for the purpose of rebutting the presumption that the transaction was usurious. *Davis v. Hardacre*, 574

4. In an action by the indorsee of a bill of exchange, although it appears that the plaintiff, in discounting it, required the indorser to take part in goods; still, if the latter voluntarily acceded to that proposal as advantageous to him, the plaintiff is not bound to prove that the goods were of the estimated value, and the burden of the proof lies upon the defendant if he would impeach the transaction as usurious. *Coombe v. Miles*, 553
5. Where a factor advances money to purchase goods, if he receives, besides legal interest, a higher commission on these purchases than he would have been contented to take had he not advanced the money, the transaction is usurious. *Harris v. Boston*, 348
6. In an action for usury, the forbearance was laid to have been from the 21st of April. On that day, the borrower, received from the defendant, 1/2 part of the sum lent, a cheque which was void for want of a stamp. This the borrower the same day paid into his banker's, who immediately gave him credit for the amount, but who did not themselves receive payment of it till the following day—Held, that as to this sum there was no forbearance till the 22d, and that there was thus a fatal variance between the declaration and the evidence. *Borrodaile q.t. v. Middleton*, 53
7. If one acting as a broker, get the discounted by another person interest, the transaction is usurious, however large he may himself where the acre change

the drawer to discount other bills for them, to enable them to take it up, and he agreed to get them discounted by another person on receiving for himself 10s per cent. beyond the legal interest, and bills were accordingly accepted by them, which he got discounted pursuant to the terms of the agreement,—it was held that these bills were valid in the hands of a bona fide indorsee, although the person who got them discounted was liable to a penalty for taking excessive commission.
Dagnall v. Wylic, 33

WAGER.

1. An action cannot be maintained on a wager on a point of law in which the parties have no interest. *Henkin v. Gerss,* 408
2. An action lies on a wager on a horse race, if neither of the sums betted by the parties amounts to 10*l.* and the race itself is run for the sum of 50*l.* or upwards. *M'Alster v. Aler,* 478

WARRANTY.

See HORSE, 2, 3. *INSURANCE,* 7, 25, 26, 27, 30.

WILL.

See EVIDENCE, 7, 8.

WITNESS.

See ATTESTING WITNESS. PRACTICE, 1.

1. A creditor of a bankrupt who has not proved his debt under the commission, is a competent witness to the commission, although he is not the estate. *Williams* 301

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tiff, without a release. *Wright v. Wardle,* 200

- Q. If this person be a married woman living apart from her husband, whether he must be released to render her a competent witness? *Ib.*
3. In an action by the indorsee against the drawer of a bill of exchange, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it had become due. *Stevens v. Lynch,* 332
4. In an action of trespass, a co-trespasser not sued is a competent witness for the plaintiff; but if one of several defendants allows judgment to go by default, he is not a competent witness for the plaintiff, although he is for his co-defendants. *Chapman v. Graves,* 333 n
5. In an action by the assignee of a bankrupt, the petitioning creditor is not a competent witness to support the commission, although he may be called on the other side to prove it invalid. *Green v. Jones,* 411
6. If a witness unexpectedly give evidence against the party calling him; although his evidence cannot be in part relied upon and the rest of it disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him. *Alexander v. Gibson,* 556
7. A witness for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined, from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection. *Burrough v. Martin,* 112
8. In a regular examination upon the *voire dire*, before the examination in chief, a witness may be interrogated as to the contents of written instruments not produced; but this cannot be done after the examination in chief, although

